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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 2, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. a & 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA

No. 940. At Law

E. E. JOHNSON, Administrator of Benjamin F. Cooksey, Deceased, Appellant,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Appellee

NOTICE OF MOTION FOR JUDGMENT—Filed December 10, 1932

(In transcript of Record from Circuit Court of Rappahannock County. Filed in Circuit Court of Rappahannock on Aug. 16, 1932.)

To the Mutual Life Insurance Company of New York, a corporation:

You are hereby notified that on Monday, the 12th day of September, 1932, between the hours of ten A. M. and four [fol. 2] P. M. of that day, or as soon thereafter as it may be heard, E. E. Johnson, Administrator of Benjamin F. Cooksey, Deceased, who duly qualified as such before the clerk of the circuit court of Rappahannock County, Virginia, on the 25th day of January, 1932, will move the Circuit Court of the County of Rappahannock at the Court House thereof, at Washington, Virginia, Rappahannock County, for a judgment against you for the sum of Forty-five Hundred Dollars ($4500.00), with interest thereon from the 20th day of January, 1932, until paid, together with the costs incident to this proceeding, all of which is justly due and owing from you to the plaintiff in this notice of motion, under and by virtue of a certain contract or policy of insurance in writing, made by you in the lifetime of Benjamin F. Cooksey, and on the 16th day of May, 1930, which contract is your policy No. 4,335,235, which said contract or policy is here filed along with this notice of motion and asked to be read as a part hereof, purporting and reciting thereby in consideration of the application and of the

payment of the first premium of $185.04 by the said Benjamin F. Cooksey in his lifetime, the receipt whereof you thereby acknowledged, and of the payment of a like amount upon each 16th day of May after the date of the policy until the death of the insured; $4.50 of which said amount is the premium on a double indemnity provision, as shown by the said contract or policy, and $31.99 the premium for disability provisions, as shown by said contract or policy, you undertook and promised the said Benjamin F. Cooksey that you would pay his executors, administrators or assigns, the sum of Forty-five Hundred Dollars ($4500.00) upon receipt of due proof of the death of the said Benjamin F. Cooksey, the insured.

And by said contract or policy of insurance dated and numbered as aforesaid, you further agreed, stipulated and provided under Section 12 of said policy, second paragraph, that a grace of thirty-one days would be granted for the payment of each premium after the first, during which days of grace the insurance would continue in force.

And by said contract or policy of insurance, dated and numbered as aforesaid, you further agreed, stipulated and [fol. 3] provided that if not later than six months after the due date of any premium in default, provided no previously due premium was in default, due proof should be received by you prior to the date the assured attained the age of sixty years, that the insured was totally and permanently disabled, as defined in a section mentioned in your policy entitled "Benefits in Event of Total and Permanent Disability before Age 60", which section is Section 3 of your said contract or policy, dated and numbered as aforementioned, at the date when such premium in default fell due, and was continuously so disabled since said due date of said premium, the policy would be reinstated without evidence of insurability and the waiver of premium and disability income benefits, you would pay the same as if such default had not occurred, the latter provision found on page 4 of your said contract or policy, dated and numbered as aforesaid, under heading "Supplementary Benefits to Section Entitled Benefits in Event of Total and Permanent Disability before Age 60".

And after the making and delivery of your said contract or policy of insurance, and on the 8th day of June, 1931, while said policy was in full force and effect, a further stipulation, agreement and provision was endorsed on your

said contract or policy and made a part thereof, to the effect that the premiums on the said contract or policy of insurance were changed to one-fourth annual payments, each of which being $49.05, and that same would fall due on the 16th day of May, August, November and February in each year. This endorsement found on page 4 of your said contract of policy of insurance.

The insured met all payments for premiums when due, but failed to pay the premium of $49.05 on November 16, 1931, and became totally and permanently disabled within the intent and meaning of your said contract or policy of insurance on the 4th day of December, 1931, and was continuously so totally and permanently disabled until his death which occurred on the 20th day of January, 1932, with which said total and permanent disability the insured was afflicted before arriving at the age of sixty years, and in fact when he was in his forty-fifth year.

[fol. 4] And after the insured became totally and permanently disabled, as herein alleged, on the 4th day of December, 1931, and after his death on the 20th of January, 1932 and on the 27th day of January, 1932, and on sundry other days thereafter, due and sufficient proof was made to you in conformity with the terms and conditions of said policy of the permanent and total disability of the insured, as well as of his death. And after the 4th of December, 1931, continuously until the date of the death of the insured, he was totally and permanently disabled within the meaning and intent of your said contract or policy of insurance.

But, notwithstanding the compliance on the part of the insured with all the provisions, terms and conditions of said contract or policy of insurance, you arbitrarily and in violation of the terms and conditions of said policy, denied any and all liability to the insured, or to his administrator, and would not pay the sum of Forty-five Hundred Dollars due on account of and under the provisions of your said policy.

And the said Benjamin F. Cooksey in his lifetime did perform, fulfill, observe and comply with, and his administrator has performed, fulfilled, observed and complied with each and all of the conditions, provisos and stipulations in the said contract or policy contained, or to the same annexed, on the part of and in behalf of the said Benjamin F. Cooksey in his lifetime, and of his administrator since the

death of the said Benjamin F. Cooksey to be performed, fulfilled, observed and complied with. And neither the said Benjamin F. Cooksey in his lifetime, nor his administrator at any time since his death, violated any of the provisions, conditions, or provisos in the said contract of insurance or policy contained, within the intent and meaning thereof according to the form, effect, true intent or meaning thereof.

And, although more than seven months have elapsed since proof was made, as aforesaid, to you of the total and permanent disability of the insured and of his death, you have not as yet paid to the complainant in this notice of motion, as aforesaid, the sum of Forty-five Hundred Dollars ($4500.00) to which the estate of the insured is entitled, [fol. 5] or any part thereof, but the same and every part thereof are wholly unpaid and unsatisfied to the said administrator, contrary to the force, effect, true intent and meaning thereof; and although often requested, you have wholly neglected, failed and refused, and still doth neglect, fail and refuse to keep your said agreement and perform your said contract;

Wherefore judgment for the sum of Forty-five Hundred Dollars ($4500.00), with interest as aforesaid, together with the cost incident to this procedure, will be asked at the hands of the court at the time and place hereinabove set out.

Given under my hand this 12th day of August, 1932.

E. E. Johnson, Administrator of Benjamin F. Cooksey, Deceased. Burnett Miller, W. F. Moffett, Counsel.

And on the reverse side of said Notice of Motion is the return in the words and figures following, to-wit:

Executed in the City of Richmond, Virginia, August 15, 1932, by delivering in duplicate a copy of within Notice of Motion to Peter Saunders, the Secretary of the Commonwealth of Virginia, and as such Secretary of the Commonwealth the Statutory Agent for The Mutual Life Insurance Co. of New York.

Place of residence and place of business of said Saunders being in the City of Richmond, Va.

Fee of $2.50 paid the Secretary at time of service.

Sheriff's fee: $1.00, paid.

J. Herbert Mercer, Sheriff of the City of Richmond, Va. By S. J. Wingfield, Deputy Sheriff.

[fol. 6] And on the front side of said Notice of Motion are the words and figures following, to-wit:

Ret'd by S. J. Wingfield, D. S. & Field in Clerk's Office, Rappahannock County, August 16th, 1932.

Teste:

Jas. M. Settle, Clerk.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER—Filed December 23, 1932

The Mutual Life Insurance Company of New York demurs to the notice of motion for judgment in this action and says that it is not sufficient in law for the following reasons:

That the said notice of motion for judgment fails to allege that due and sufficient proof was made by insured to the insurance company while the contract of insurance was in force of the total and permanent disability of the insured.

That before any action can be maintained under the contract of insurance the notice of motion for judgment must allege that due and sufficient proof was made to the insurance company while the policy of insurance was in force of the total and permanent disability of the insured.

That the giving of this notice to the insurance company by the insured or someone for him while the insurance is [fol. 7] in force of the total and permanent disability of the insured is a condition precedent to maintaining this action.

That the beneficiary of the insured is not entitled to the supplementary benefits to section entitled "benefits in event of total and permanent disability before age sixty" if premium in default not over six months, being section 3 of said contract of insurance as the insured died prior to the giving of due and sufficient proof of the total and permanent disability of the insured which disability is alleged to have

occurred while said contract of insurance was in force which said notice of motion fails to allege that said notice of the total and permanent disability of the insured was given to the insurance company prior to the death of the insured and that notice given subsequent to the death of the insured of his total and permanent disability which occurred while the contract of insurance was in force and not later than six months after the due date of any premium in default is not sufficient to revive said supplementary benefits to section 3 aforesaid in favor of the insured's estate, the beneficiary under said policy.

The Mutual Life Insurance Company of New York, by Martin & Abbott, Counsel. Frederick L. Allen, Martin and Abbott, p. d.

In United States District Court

Plea—Filed December 23, 1932

This day came The Mutual Life Insurance Company of New York by its attorney and without waiving its rights under the demurrer filed in this action says that it did not [fol. 8] undertake or promise in any manner or form as the plaintiff hath in this action complained. And of this the said defendant puts itself upon the country.

Martin and Abbott, Attorneys. Martin & Abbott. Frederick L. Allen, Martin and Abbott, p. q.

In United States District Court

[Title omitted]

Order Overruling Demurrer, Etc.—Entered March 22, 1933

This day came the parties by their counsel, and the defendants having heretofore filed a demurrer in writing and likewise having stated their grounds of demurrer in writing, in which demurrer the plaintiffs join, and the court having heard the argument of counsel and maturely considered the said demurrer, and being of opinion that the said motion is sufficient in law for the plaintiff to have and mantain his action against the defendant, therefore it is considered by

the court that the said demurrer be and the same is overruled, with leave to the defendant to plead to the motion;

Whereupon, and before the defendant pleaded to said [fol. 9] motion the plaintiff moved the court for leave to amend the said motion and thereupon did amend the same by inserting therein on page 3 after the words, "on the 4th day of December, 1931", the words:

"And in addition thereto the said insured then and there became and was likewise incapable both physically and mentally of preparing, executing and forwarding to the defendant proofs of his said disability";

And the plaintiff's demurrer to the original motion was directed to stand and be treated as a demurrer to the amended motion and the same was again overruled.

Whereupon the said defendant filed its plea in writing, to which the plaintiff replied generally, and issue was joined thereon; and on motion of the plaintiff, it is Ordered by the court that the defendant file a statement in writing of the particulars of its grounds of defense within 5 days from this date. And this case is set for trial on the 29th day of March, 1933.

Be it remembered that the defendant excepted to the ruling of the court overruling its demurrer to the plaintiff's original motion, and also to the motion as amended.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO AMEND NOTICE OF MOTION, ETC.—Entered March 29, 1933

On motion of the plaintiff for leave to amend his notice [fol. 10] of motion by filing two additional counts, such leave was granted him and he thereupon filed the same;

And this cause by consent of parties is transferred to Lynchburg, for trial on the merits.

The clerk will enter this order in the common law order book and certify a copy hereof to the deputy clerk of this court at Lynchburg and transmit therewith the papers in this cause.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO NOTICE OF MOTION FOR JUDGMENT—Filed March 29, 1933

By way of amendment to the notice of motion for judgment filed in this cause in the Circuit Court of Rappahannock County, Virginia, and removed to this court for trial, plaintiff in the notice says and alleges:

First Amended Count

That you, The Mutual Life Insurance Company of New York, a corporation, are indebted to him as the personal representative of Benjamin F. Cooksey, in the sum of Forty-five Hundred Dollars ($4500.00) with interest thereon from the 20th day of January, 1932, until paid, together with the costs incident to this proceeding, all of which is justly due and owing from you to the plaintiff in this notice of motion, under and by virtue of a certain contract or policy of insurance in writing, made by you in the lifetime of Benjamin F. Cooksey, and on the 16th day of May, 1930, which contract is your policy No. 4,335,235 which said contract or policy is here filed along with this notice of motion and asked to be read as a part hereof, purporting and reciting thereby in consideration of the application and of the payment of the first premium of $185.04 by the said Benjamin F. Cooksey in his lifetime, the receipt whereof you thereby acknowledged, and of the payment of a like amount upon each 16th day of May after the date of the policy until the death of the insured; $4.50 [fol. 11] of which said amount is the premium on a double indemnity provision as shown by the said contract of policy, and $31.99 the premium for disability provisions as shown by said contract or policy, you undertook and promised the said Benjamin F. Cooksey that you would pay his executors, administrators or assigns, the sum of Forty-five Hundred Dollars ($4500.00) upon receipt of due proof of the death of the said Benjamin F. Cooksey, the insured.

And by said contract or policy of insurance dated and numbered as aforesaid, you further agreed, stipulated and provided under Section 12 of said policy, second paragraph, that a grace of thirty-one days would be granted for the payment of each premium after the first, during which days of grace the insurance would continue in force.

And by said contract or policy of insurance, dated and numbered as aforesaid, you further agreed, stipulated and provided that if not later than six months after the due date of any premium in default, provided no previously due premium was in default, due proof should be received by you prior to the date the assured attained the age of sixty years, that the insured was totally and permanently disabled as defined in a section mentioned in your policy entitled "Benefits in Event of Total and Permanent Disability before Age 60", which section is Section 3 of your said contract or policy, dated and numbered as aforementioned, at the date when such premium in default fell due, and was continuously so disabled since said due date of said premium, the policy would be reinstated without evidence of insurability and the waiver of premium and disability income benefits, you would pay the same as if such default had not occurred, the latter provision found on page 4 of your said contract or policy, dated and numbered as aforesaid, under heading, "Supplementary Benefits to Section Entitled "Benefits in Event of Total and Permanent Disability before Age 60."

And after the making and delivery of your said contract or policy of insurance, and on the 8th day of June, 1931, [fol. 12] while said policy was in full force and effect, a further stipulation, agreement and provision was endorsed on your said contract or policy and made a part thereof, to the effect that the premiums on the said contract or policy of insurance were changed to one-fourth annual payments, each of which being $49.05, and that same would fall due on the 16th day of May, August, November and February in each year. This endorsement found on page 4 of your said contract or policy of insurance.

The insured met all payments for premiums when due, but failed to pay the premium of $49.05 on November 16, 1931, and became totally and permanently disabled within the intent and meaning of your said contract or policy of insurance on or about the 15th day of November, 1931, and in addition thereto the said insured then and there became and was likewise incapable both physically and mentally of preparing, executing and forwarding to the defendant proofs of his said disability; and was continuously so totally and permanently disabled until his death which occurred on or about the 20th day of January, 1932, with which said total and permanent disability the insured was afflicted

before arriving at the age of sixty years, and in fact when he was in his forty-fifth year.

And after the insured became totally and permanently disabled, as herein alleged, on or about the 15th day of November, 1931, and after his death on or about the 20th of January, 1932, and on the 27th day of January, 1932, and on sundry other days thereafter, due and sufficient proof was made to you in conformity with the terms and conditions of said policy of the permanent and total disability of the insured, mentally and physically, as well as of his death. And on or about the 15th of November, 1931, continuously until the date of the death of the insured, he was totally and permanently disabled, mentally and physically, within the meaning and intent of your said contract or policy of insurance.

But, notwithstanding the compliance on the part of the insured with all the provisions, terms and conditions of said [fol. 13] contract or policy of insurance, you arbitrarily and in violation of the terms and conditions of said policy, denied any and all liability to the insured, or to his administrator, and would not pay the sum of Forty-five Hundred Dollars due on account of and under the provisions of your said policy.

And the said Benjamin F. Cooksey in his lifetime did perform, fulfill, observe and comply with, and his administrator has performed, fulfilled, observed and complied with each and all of the conditions, provisos and stipulations in the said contract or policy contained, or to the same annexed, on the part of and in behalf of the said Benjamin F. Cooksey in his lifetime, and of his administrator since the death of the said Benjamin F. Cooksey to be performed, fulfilled, observed and complied with. And neither the said Benjamin F. Cooksey in his lifetime, nor his administrator at any time since his death, violated any of the provisions, conditions, or provisos in the said contract of insurance or policy contained, within the intent and meaning thereof according to the form, effect, true intent or meaning thereof.

And although more than seven months have elapsed since proof was made as aforesaid to you of the total and permanent disability of the insured, mentally and physically, and of his death, you have not as yet paid to the complainant in this notice of motion, as aforesaid the sum of Forty-five Hundred Dollars ($4,500.00) to which the es-

tate of the insured is entitled, or any part thereof, but the same and every part thereof are wholly unpaid and unsatisfied to the said administrator contrary to the force, effect, true intent and meaning thereof, and although often requested, you have wholly neglected, failed and refused, and still doth neglect, fail and refuse to keep your said agreement and perform your said contract.

Second Amended Count

That you, The Mutual Life Insurance Company of New York a corporation, are indebted to him as the personal representative of Benjamin F. Cooksey, in the sum of [fol. 14] Forty-five Hundred Dollars ($4500.00) with interest thereon from the 20th day of January, 1932, until paid, together with the costs incident to this proceeding, all of which is justly due and owing from you to the plaintiff in this notice of motion, under and by virtue of a certain contract or policy of insurance in writing, made by you in the lifetime of Benjamin F. Cooksey, and on the 16th day of May, 1930, which contract is your policy No. 4,335,235 which said contract or policy is here filed along with this notice of motion and asked to be read as a part hereof, purporting and reciting thereby in consideration of the application and of the payment of the first premium of $185.04 by the said Benjamin F. Cooksey in his lifetime, the receipt whereof you thereby acknowledged, and of the payment of a like amount upon each 16th day of May after the date of the policy until the death of the insured; $4.50 of which said amount is the premium on a double indemnity provision as shown by the said contract or policy, and $31.99 the premium for disability provisions as shown by said contract or policy, you undertook and promised the said Benjamin F. Cooksey that you would pay his executors, administrators or assigns, the sum of Forty-five Hundred Dollars ($4500.00) upon receipt of due proof of the death of the said Benjamin F. Cooksey, the insured.

And by said contract or policy of insurance dated and numbered as aforesaid, you further agreed, stipulated and provided under Section 12 of said policy, second paragraph, that a grace of thirty-one days would be granted for the payment of each premium after the first, during which days of grace the insurance would continue in force.

And by said contract or policy of insurance, dated and numbered as aforesaid, you further agreed, stipulated and

provided that if not later than six months after the due date of any premium in default, provided no previously due premium was in default, due proof should be received by you prior to the date the assured attained the age of sixty years, that the insured was totally and permanently disabled as defined in a section mentioned in your policy entitled "Benefits in Event of Total and Permanent Dis-[fol. 15] ability before Age 60", which section is Section 3 of your said contract or policy, dated and numbered as aforementioned, at the date when such premium in default fell due, and was continuously so disabled since said due date of said premium, the policy would be reinstated without evidence of insurability and the waiver of premium and disability income benefits, you would pay the same as if such default had not occurred, the latter provision found on page 4 of your said contract or policy, dated and numbered as aforesaid, under heading, "Supplementary Benefits to Section Entitled "Benefits in Event of Total and Permanent Disability before Age 60".

And after the making and delivery of your said contract or policy of insurance, and on the 8th day of June, 1931, while said policy was in full force and effect, a further stipulation, agreement and provision was endorsed on your said contract or policy and made a part thereof, to the effect that the premiums on the said contract or policy of insurance were changed to one-fourth annual payments, each of which being $49.05, and that same would fall due on the 16th day of May, August, November, and February in each year. This endorsement found on page 4 of your said contract or policy of insurance.

The insured met all payments for premiums when due, but failed to pay the premium of $49.05 on November 16, 1931, and became totally and permanently disabled within the intent and meaning of your said contract or policy of insurance on or about the 15th day of November, 1931, and in addition thereto the said insured then and there became and was likewise incapable both physically and mentally of preparing, executing and forwarding to the defendant proofs of his disability; and was continuously so totally and permanently disabled until his death which occurred on or about the 20th day of January, 1932, with which said total and permanent disability the insured was afflicted before arriving at the age of sixty years, and in fact when he was in his forty-fifth year.

[fol. 16] And after the insured became totally and permanently disabled, as herein alleged, on or about the 15th day of November, 1931, and after his death on or about the 20th day of January, 1932, and on the 27th day of January, 1932, and on sundry other days thereafter, the due and sufficient proof of the mental and physical disability of the insured required by the terms and conditions of the policy was waived by the defendant company, its authorized agents and officials to waive such notice. And on or about the 15th of November, 1931, continuously until the date of the death of the insured, he was totally and permanently disabled, mentally and physically, within the meaning and intent of your said contract or policy of insurance.

But, notwithstanding the compliance on the part of the insured with all the provisions, terms and conditions of said contract or policy of insurance, and of the waiver of notice and proof of the total and permanent disability, mental and physical, of the insured, you arbitrarily and in violation of the terms and conditions of said policy, denied any and all liability to the insured, or to his administrator, and would not pay the sum of Forty-five Hundred Dollars due on account of and under the provisions of your said policy.

And the said Benjamin F. Cooksey in his lifetime did perform, fulfill, observe and comply with, and his administrator has performed, fulfilled, observed and complied with each and all of the conditions, provisos and stipulations in the said contract or policy contained, or to the same annexed, on the part of and in behalf of the said Benjamin F. Cooksey in his lifetime, and of his administrator since the death of the said Benjamin F. Cooksey to be performed, fulfilled, observed and complied with. And neither the said Benjamin F. Cooksey in his lifetime, nor his administrator at any time since his death, violated any of the provisions, conditions, or provisos in the said contract of insurance or policy contained, within the intent and meaning thereof according to the form, effect, true intent or meaning thereof.

And although more than seven months have elapsed since [fol. 17] waiver of notice and proof was made to you of the total and permanent disability of the insured, mentally and physically, and of his death, you have not as yet paid to the complainant in this notice of motion, as aforesaid

the sum of Forty-five Hundred Dollars ($4500.00) to which the estate of the insured is entitled, or any part thereof, but the same and every part thereof are wholly unpaid and unsatisfied to the said administrator contrary to the force, effect, true intent and meaning thereof, and although often requested, you have wholly neglected, failed and refused, and still doth neglect, fail and refuse to keep your said agreement and perform your said contract.

Wherefore judgment for the sum of Forty-five Hundred Dollars ($4500.00) with interest as aforesaid, together with the costs incident to this procedure, as set forth in both the amended counts of the original notice of motion, as well as in the original notice of motion, will be asked at the hands of the court, the cause having been transferred to this Court from the Circuit Court of Rappahannock County, Virginia.

Given under my hand this 29th day of March, 1933.

E. E. Johnson, Administrator of Benjamin F. Cooksey, Dec'd. W. F. Moffett, John S. Barbour, Burnett Miller, Counsel.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO FILE GROUNDS OF DEFENSE—Entered March 29, 1933

This day came the defendant by its attorneys and asked leave to file its grounds of defense, which is accordingly so ordered.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed March 29, 1933

For grounds of defense to be relied upon by the defendant under its plea filed in this action are as follows:

1. That the defendant is not liable under the motion for judgment on the contract of insurance therein mentioned because of non-payment of premium due on said policy on the 16th day of November, 1931, said policy of insurance having lapsed prior to death of insured.

2. That payment of said premium has not been waived by the defendant as alleged in said motion for judgment by plaintiff for the following reasons:

(a) That insured, or some one for him, did not furnish to the defendant company due proof that he was totally and permanently disabled within the intent and meaning of [fol. 19] said contract or policy of insurance, as alleged in said motion for judgment.

(b) That the giving of said notice or proof of total and permanent disability by the insured or some one for him is a condition precedent to waiver of premiums.

(c) That the insured was not totally and permanently disabled within the intent and meaning of said contract of insurance, prior to the due date of the premium due November 16, 1931.

(d) That total and permanent disability occurring during the grace period of said premium in default is not within the intent and meaning of said contract or policy of insurance.

(e) That total and permanent disability of the insured standing alone, is not sufficient to cause defendant to reinstate said policy of insurance and waive payment of premiums unless proof is furnished by insured of his total and permanent disability to the company, which accrued prior to due date of the premium in default.

(f) That proof of death is not proof of total and permanent disability where the giving of proof of disability (20) is made a condition precedent.

(g) That the premium due under said contract of insurance on November 16, 1931, was not waived by the defendant company because all of the conditions and provisions contained in said policy have not been fully complied with by the insured.

(h) That it was not within the intent and meaning of said contract of insurance to waive payment of premiums already in default, re-instate the insurance in favor of insured, without evidence of insurability, where the insured died without furnishing to the insurance company at its home office, proof of the total and permanent disability of

the insured occurring prior to the due date of the premium in default.

[fol. 20] (i) That the insured was not physically and mentally disabled as alleged in said motion for judgment.

(j) That said contract of insurance cannot be reinstated in favor of insured where he has died without furnishing proof of total and permanent disability to the defendant company prior to his death.

The defendant does not confine itself to the above grounds of defense, but reserves the right to additional defenses it may have under its plea of the general issue heretofore filed.

Respectfully, The Mutual Life Insurance Co. of N. Y., by Martin & Abbott, Counsel. Frederick L. Allen, Martin and Abbott, p. d.

In United States District Court

Demurrer—Filed April 20, 1933

The Mutual Life Insurance Company of New York, defendant, by its attorneys, demurs to the amended motion generally and to each count separately thereof, and says it is not sufficient in law, for the following reasons:

First Amended Count

1. That the amended motion for judgment fails to allege that proof of the total and permanent disability of the insured, alleged to have occurred prior to due date of the premium in default, was furnished the company by the insured, or someone for him, prior to his death.

2. That before any action can be maintained under the [fol. 21] contract or policy of insurance, the motion for judgment must allege that the insured or someone for him furnished the company with proof that he was totally and permanently disabled prior to the due date of the premium in default, and that, after furnishing the company with such proof, the disability continued to death of insured. The amended motion for judgment does not allege this.

3. The amended motion for judgment fails to allege that proof of disability was furnished by the insured and prior to his death; in fact, it admits that proof was never furnished until after death of insured.

4. That the furnishing of proof of disability by the insured is made a condition precedent to waiver of premiums by the terms of said contract of insurance, and that the amended motion for judgment fails to allege that the disability provisions of said policy have been complied with in this particular.

5. That the allegations in the amended motion for judgment that proof of the disability of the insured was furnished by the beneficiary, after the death of the insured, is not a sufficient compliance with the conditions and provisions of said policy of insurance to effect a waiver of premiums by the company or to reinstate the contract of insurance in favor of insured, whose death preceded the furnishing of proof.

6. That, under the terms and provisions of the policy of insurance here involved, the mental and physical incapacity of the insured to furnish proof of disability to the company does not excuse him from furnishing such proof, nor is the proof of disability or payment of premiums waived in such event by the defendant company.

Second Amended Count

1. The same reasons are here relied upon in this count as assigned to the First Amended Count, except Assignment No. 5, being 1, 2, 3, 4 and 6, respectively, to the same extent as if set out hereunder in full.

[fol. 22] Defendant does not waive its rights under its demurrer filed to the original motion for judgment, which was overruled by the Court.

Defendant reserves the right to add to, enlarge or amend these grounds of demurrer if it be so advised.

Frederick L. Allen, Martin & Abbott, p. d.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING DEMURRER—Entered June 5, 1933

This day came the parties by their counsel, and the defendant having heretofore filed a demurrer in writing and likewise having stated its grounds of demurrer to the amended notice of motion for judgment, and each count separately thereof, in which demurrer to the amended notice of motion for judgment the plaintiff joins, and the court being of the opinion that said amended motion is sufficient in law for the plaintiff to have and maintain his action against the defendant, therefore it is considered by the court that the said demurrer to the amended motion for judgment, and to each count thereof, be and the same is overruled, with leave to the defendant to plead to the motion;

Whereupon, the said defendant, by leave of court, filed its plea in writing, to which the plaintiff replied generally, [fol. 23] and issue was joined thereon. And thereupon the defendant did file and assign in writing its grounds of defense relied upon in support of its plea.

Be it remembered that the defendant then and there excepted to the ruling of the court in overruling its demurrer to the plaintiff's amended motion for judgment.

IN UNITED STATES DISTRICT COURT

PLEA—Filed June 5, 1933

This day came the Mutual Life Insurance Company of New York by its attorney and without waiving its rights under the demurrer filed in this action to the original notice of motion for judgment and to the amended notice of motion for judgment and each count therein says that it did not undertake or promise in any manner or form as the plaintiff hath in this action complained and this the defendant puts itself upon the country.

And for grounds of defense to be relied upon by the defendant to the amended notice of motion for judgment and each count therein under its plea in this action, both to the

original notice of motion and the amended notice of motion, are as follows:

1. That the defendant is not liable under the motion for judgment on the contract of insurance therein mentioned because of non-payment of premium due on said policy on the 16th day of November, 1931, said policy of insurance having lapsed prior to death of insured.

2. That payment of said premium has not been waived by the defendant as alleged in said motion for judgment by plaintiff for the following reasons:

(a) That insured, or some one for him, did not furnish to the defendant company due proof that he was totally and [fol. 24] permanently disabled within the intent and meaning of said contract or policy of insurance, as alleged in said motion for judgment.

(b) That the giving of said notice or proof of total and permanent disability by the insured or some one for him is a condition precedent to waiver of premiums.

(c) That the insured was not totally and permanently disabled within the intent and meaning of said contract of insurance, prior to the due date of the premium due November 16, 1931.

(d) That total and permanent disability occurring during the grace period of said premium in default is not within the intent and meaning of said contract or policy of insurance.

(e) That total and permanent disability of the insured standing alone, is not sufficient to cause defendant to reinstate said policy of insurance and waive payment of premiums unless proof is furnished by insured of his total and permanent disability to the company, which accrued prior to due date of the premium in default.

(f) That proof of death is not proof of total and permanent disability where the giving of proof of disability is made a condition precedent.

(g) That the premium due under said contract of insurance on November 16, 1931, was not waived by the defendant company because all of the conditions and provisions

contained in said policy have not been fully complied with by the insured.

(h) That it was not within the intent and meaning of said contract of insurance to waive payment of premiums already in default, re-instate the insurance in favor of insured, without evidence of insurability, where the insured died without furnishing to the insurance company at its home office, proof of the total and permanent disability of the insured occurring prior to the due date of the premium in default.

[fol. 25] (I) That the insured was not physically and mentally disabled as alleged in said motion for judgment.

(j) That said contract of insurance cannot be reinstated in favor of insured where he has died without furnishing proof of total and permanent disability to the defendant company prior to his death.

3. That the due and sufficient proof of the mental and physical condition of the insured required by the terms and conditions of the policy was not waived by the defendant, its authorized agents and officials on the 27th day of January, 1932, or on any other day thereafter.

4. The defendant denies that any notice or proof was ever made to the defendant by the plaintiff or his intestate, the insured, of the total and permanent disability of the insured or that the proof of the total and permanent disability of the insured was waived by it, the said defendant, as alleged in the notice of motion for judgment.

5. The defendant denies that the insured was totally and permanently disabled mentally and physically on or about the 15th day of November, 1931, or at any other time, or that the insured was physically or mentally incapable of furnishing to the defendant notice or proof of his said disability as required by the contract of insurance.

6. The defendant avers neither the insured under the said policy, the said Benjamin F. Cooksey, nor any one else in his behalf, paid on or before the due date thereof or within the designated period of grace thereafter, the premium provided by the said contract of insurance mentioned in the notice of motion for judgment due on November 16,

1931 and that the said Benjamin F. Cooksey was not from the due date of said premium until the expiration of the period of grace thereafter totally and permanently disabled and was not during said period mentally and physically incapable of furnishing proof of such disability as then existed.

7. The defendant avers that the insured, Benjamin F. [fol. 26] Cooksey, was not totally and permanently, or mentally and physically disabled prior to the due date of the premium, falling due on November 15, 1931, and that he was not mentally and physically incapable of furnishing proof of such disability as did exist from said due date continuously to his death on January 20, 1932.

The defendant reserves the right to add to, enlarge or amend this grounds of defense if it be so advised at or before the time of the trial of this case and reserves the right to any additional defenses it may have under its plea of the general issue herein filed.

Respectfully, The Mutual Life Insurance Company of New York, by —— ——, Counsel. Frederick L. Allen, Martin and Abbott, p. d.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EMPANELLING JURY, ETC.—Entered June 16, 1933

This day came the parties by their attorneys, and the pleadings having been made up; thereupon came the fol- [fol. 27] lowing jury to-wit: 1. L. W. Baughan, 2. E. G. Shearer, 3. Suter Ballard, 4. Floyd Hudson, 5. Nelson Hicks, 6. K. P. Jennings, 7. W. J. LeGrand, 8. Duval Nicholas, 9. J. Frank Overstreet, 10. Stanley Perrow, 11. Bruce W. Powell, 12. C. B. Stone, who were duly elected, examined and sworn according to law. Thereupon counsel for both sides proceeded to make their statements. And the plaintiff proceeded to introduce his evidence until the conclusion thereof, and the hour of adjournment having arrived, it is ordered that this court stand adjourned until 9:30 o'clock a. m., to-morrow.

In United States District Court

No. 940. Law.

E. E. Johnson, Admr. of Benjamin F. Cooksey, Deceased,

v.

The Mutual Life Insurance Company, of New York, a Corporation

Verdict and Judgment—Entered June 17, 1933

Present: Honorable John Paul, District Judge.

This day came again the parties by their attorneys, and came also the same jury as on yesterday. Thereupon the defendant, by its attorney, moved the Court for a directed verdict in favor of the said defendant, which said motion was granted and a verdict directed by the Court, to which the plaintiff, by his attorney, excepted. Thereupon the court directed the jury to find for the defendant which was accordingly done, and said jury returned the following verdict: "We, the jury, by direction of the Court, find for the defendant. This 17th day of June, 1933. L. W. Baughan, Foreman." Thereupon the plaintiff, by his attorney, [fol. 28] moved the Court to set aside the verdict as contrary to the law and evidence, which said motion was overruled, to which the plaintiff, by counsel excepted.

Whereupon, it is considered and adjudged by the Court that the plaintiff take nothing by his false clamor, etc.; and that the said defendant recover of and from said plaintiff its costs about its defense in this behalf expended, and for the collection of said costs a writ of fieri facias may issue, after ten days from this date, at the instance of said defendant, or its attorney.

In United States District Court

[Title omitted]

Order Extending Time—Entered August 10, 1933

Upon motion of the plaintiff, and for reasons appearing sufficient to the Court, it is ordered that the time within

which the plaintiff may prepare and tender his bills of exception in the above case be extended to September 10, 1933.

[fol. 29] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed August 28, 1933

Now comes the plaintiff by his attorneys and submits and files the following assignments of error upon which he will rely in the prosecution of the writ of error in the above entitled cause:

1

The United States District Court erred in holding that there was no issue of fact in this cause which was material for its determination, and therefore, nothing upon which a jury could properly pass. In fact the evidence showed that there were issues of facts material for determination of the cause and upon which the jury should have been allowed to pass.

2

The United States District Court erred in directing a verdict in favor of the defendant; the evidence did not justify such action on the part of the Court, and in so doing the action of the said Court was not sustained by law.

3

The United States District Court erred in refusing to sustain the motion submitted by counsel for plaintiff to set aside the jury's verdict, because contrary to the law and the evidence.

Wherefore the said E. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, plaintiff in error, prays that the verdict of the jury returned and judgment of the United States District Court for the Western District of Virginia, rendered on the 17th day of June, 1933, in this cause be reversed, the verdict set aside, and that said court [fol. 30] be directed to grant a new trial of the said cause.

John S. Barbour, W. F. Moffett, Burnett Miller, Attorneys for Plaintiff in Error in the Trial Court.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE CERTAIN EXHIBITS—Entered August 28, 1933

On motion of counsel, assigning as grounds therefor that it will be essential to the clear understanding of the Court, and it being highly inconvenient otherwise to get the same before the Appellate Court, and it appearing to the Court proper, it is, therefore, ordered that the original policy of insurance sued on and marked "Exhibit 1" be certified up with and as a part of the record in this cause; and also the original of the University of Virginia Hospital record of the insured, marked "Exhibit 10"; and also photostatic copy of "statement No. 1 to be made by person claiming the insurance", introduced by defendant and numbered and marked respectively "Exhibit- 9, 11 and 15."

[fol. 31] IN UNITED STATES DISTRICT COURT

Narrative Transcript of Evidence, etc.

Signed and approved by Hon. John Paul, District Judge. August 28, 1933.

Filed September 28, 1933.

Narrative of the evidence and other incidents of the trial, in the above cause, tried before the Honorable John Paul, Judge of said Court, and a jury, at Lynchburg, Virginia, on the 16th day of June, 1933.

Appearances:

Messrs. Burnett Miller, John S. Barbour, and W. F. Moffett—Counsel for plaintiff.

Messrs. Martin and Abbott—Counsel for defendant.

Narrative stenographic report of testimony and other incidents of the trial of the cause of E. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, plaintiff, v. The Mutual Life Insurance Company of New York, a corporation, defendant, in the District Court of the United States for the Western District of Virginia, at Lynchburg, before Honorable John Paul, Judge of the said Court, and

a jury, which trial began on June 16, 1933, and ended June 17, 1933.

The plaintiff was represented by Messrs. Burnett Miller, John S. Barbour and W. F. Moffett; and the defendant by Messrs. J. C. Martin and Earl L. Abbott.

Evidence Introduced on Behalf of the Plaintiff

Judge's Certificate as to Exhibit No. 1

Life Insurance Policy No. 4,335,235, in the Mutual Life Insurance Company, of New York, on the life of Benjamin F. Cooksey, for $4500.00, dated May 16th, 1930, is here introduced in evidence, and for purposes of identification is marked Exhibit No. 1, and is here certified to the Circuit Court of Appeals.

(Signed) John Paul, Judge.

[fol. 32] E. E. Johnson, sworn, testifies in direct as follows:

I live at Culpeper, Virginia, and am an attorney at law; have been practicing law for 25 years; was acquainted with Benjamin F. Cooksey, who was a nephew of mine, and I knew him all of his life, he was approximately 36 or 37 years old when he died on January 20th, 1932. The last time I talked with him before his death was approximately the 25th of December, a few days before or a few after that, I also talked to him in the early part of November, and he would drop into my office every week or ten days when he came to Culpeper. Could not tell with any accuracy how long it was before the 20th of December that I saw him. At that time he was sick in bed and was not allowed to get up. That was around Christmas and I heard he was confined to his bed and I went to see him. I qualified as his personal representative, I think on January 25, 1932, at Washington, Rappahannock County, Virginia.

Q. What did you do after your qualification as the personal representative of Mr. Cooksey?

Counsel for defendant objects to the question on the ground that it is immaterial, irrelevant and incompetent and is not in any way at all connected with the provisions

of this contract; that the witness is going to say that he gave notice to the insurance company on the 27th of January and our contention is that it was too late to give notice after the insured died; the notice had to be given during the lifetime of the insured; that the witness expects to state that he gave notice or that they refused to permit him to give notice. On the further ground that the policy provides: "No agent or other person except the President, Vice-President, a Second Vice President or a Secretary of the company has power on behalf of the company to bind the company by making any promises respecting benefits or accepting any representations or information not contained in the written application for this policy, or to make or modify this contract, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the company's rights or requirements."

[fol. 33] Further, under the policy, before he can state or testify that he secured a waiver, he must prove that he took it up with one of these parties, and the only parties with whom a waiver could be made.

Court overrules objections and Defendant excepts on grounds above stated.

A. I tried immediately to ascertain, as near as I could, what property Mr. Cooksey had. I ascertained that he had, besides tangible personal property and real estate, some insurance policies.

Q. After the discovery of the insurance policies, what did you do?

Counsel for Defendant objects to the foregoing question and moves to strike it from the record. Motion overruled. Defendant excepts to the ruling of the Court for reasons heretofore stated.

A. I proceeded to give proof of the death of Mr. Cooksey to two companies, by letter, which I mailed on the date it was written, as follows:

"January 27, 1932.

Mr. Thomas P. Morgan, Jr., Manager, Southern Building, Washington, D. C.

DEAR SIR: I am enclosing death certificate for Benjamin F. Cooksey who died on January 20, 1932, making claim under Policy #3393553, for $2500.00, as administrator of

the assured's estate. I am also enclosing certificate of appointment as administrator of the assured.

I also am filing claim at this time for policy #4334235, which was issued May 16, 1930, for $4500.00, and which last premium was due on November 16, 1931. I am filing this claim under this contract on account of the fact that the insured was taken sick and became totally disabled on December 4, 1931, before the expiration of the days of grace. This contract has a disability clause and waiver of premium clause. I believe according to the contract that [fol. 34] the estate of the assured is entitled to the benefits of this contract. Won't you please send me the necessary form of proof on this policy, and oblige?

Yours truly, —— ——."

The above letter was signed by me as administrator, Claimant's certificate and copy of attending physician's certificate which were transmitted to the company with the foregoing letter is as follows: (My recollection is that we copied the proof of death that I was sending in:)

"Claimant's Certificate

1. Number, date and amount of policy: No. 4334235, date, May 16, 1930, $4500.00; No. 3393553, date December 8, 1924, $2500.00.

2. Claimant's name in full? E. E. Johnson.

3. Residence? Culpeper, Virginia.

4. a. Are you the beneficiary named in Policy? Yes.

If not, state in what capacity you make claim? Administrator.

4b. Are you legally entitled to receive the entire amount payable on the policy? Yes.

5. What was the date of your birth? February 8, 1881.

6. Name of deceased in full: Benjamin F. Cooksey.

7. Place of birth of deceased? Castleton. County of Province; Rappahannock. State or country: Virginia.

8. Date of birth of deceased? December 22nd, 1889.

9a. Place of death of deceased? Charlottesville, Virginia.

[fol. 35] 9b. Date of death of deceased? January 20, 1932.

10a. Last residence of deceased? City or Town: Castleton, Va. County? Rappahannock. State? Virginia.

10b. Last occupation of deceased? Farmer.

11. Name and residence of physician who attended the deceased during his last illness: Dr. J. R. Boldridge. Rixeyville, Virginia.

12a. When did the health of the deceased first begin to be affected: December 4th, 1931.

12b. Duration of last illness? 46 days.

12c. Immediate cause of death: Acute Bright's Disease.

13. Was a coroner's inquest held? If so, furnish the company with a certified copy of the verdict of the jury, and all the evidence on which such verdict was based? No.

14. Had the deceased any other insurance on his life? If so, state in what companies, for what amounts, and dated and numbers of policies respectively? Life Insurance Company of Virginia; May 10, 1927, Policy No. 143388. Amount $3000,00.

(Signed) E. E. Johnson, Administrator of Benjamin F. Cooksey.

Ack N. P.

There was also a Notary Public's certificate attached to the foregoing.

I also sent the attending physician's certificate to Mr. Morgan, which is as follows:

"Attending Physician's Certificate

1. Full name of deceased? Benjamin F. Cooksey.

[fol. 36] 2. How long had you known the deceased? Fourteen years.

3. Deceased's place of residence? Castleton, Va. R. F. D. 1.

4. State apparent age of the deceased at death? 36.

5.a. How long have you been deceased's usual medical advisor? Fourteen years.

b. Were you deceased's attending physician during deceased's last illness? Yes.

c. Date of your first visit or prescription in last illness? December 4th, 1931.

6. What was the duration of final illness? 46 days.

7. Date of death? January 20, 1932.

8.a. State the disease of which the deceased died? Influenza complicated by acute Bright's Disease.

b. Give briefly symptoms present during its progress. Flu: Dec. 4th, followed by acute Bright's Disease on December 14th, 1931; cough, weakness; albumin and blood in urine.

c. Was last illness complicated by any previous illness or infirmity, acute or chronic? If so, state what and when. None previous to the above mentioned.

d. If from any cause other than a disease, state the medical and other facts connected therewith? None.

e. If accident or external injury contributed in any way to insured's death, give full details. None.

f. Was there any surgical operation? No.

g. Was a post-mortem examination made? No.

[fol. 37] 9. Was there anything in deceased's habits or mode of life or residence pre-disposing to disease? No.

(Signed) J. R. Boldridge.

"I received my medical education at Med. Col. of Va. College, from which I was graduated in May, 1909."

I received a letter from Mr. Morgan dated January 28, 1932, in reply to the letter I wrote him on January 27th, which is as follows:

The Mutual Life Insurance Company of New York

Washington, D. C.,
January 28th, 1932.

The First American Life Insurance Co., Thomas P. Morgan, Jr., Manager, Southern Building, 1421 "H" Street, N. W.

Mr. E. E. Johnson, Johnson Law Building, Culpeper, Va.

DEAR SIR: We are in receipt of your letter of the 27th, and have carefully noted the contents, in regard to policies Nos. 3393,553, and 4355,235—Benjamin F. Cooksey (deceased).

We have referred the question of benefits under Policy No. 4335,235 to the company for their consideration, and you will be advised as soon as we hear from them.

Very truly yours, Thos. P. Morgan, Jr., Manager."
JWF/MEM.

[fol. 38] The policy referred to in the letter is the one sued on here. I received a further communication from Mr. Morgan, dated February 16th, 1932, which reads as follows:

"The Mutual Life Insurance Company of New York.

The American Life Insurance Company, Washington, D. C.

February 16th, 1932.

Thomas P. Morgan, Jr., Manager, Southern Building, 1421 "H" Street, N. W.

Mr. E. E. Johnson, Johnson Law Building, Culpeper, Virginia.

DEAR SIR: With further reference to Policy No. 4335,235 —Benjamin F. Cooksey (deceased), we quote herewith letter from the Home Office:

"According to Home Office records, this policy lapsed for the non-payment of the premium due November 16th, 1931.'

"Supplementary Benefits to Section entitled Benefits in Event of Total and Permanent disability before age 60."

We refer you to that part of the policy contract formerly held by Mr. Cooksey:

Benefits if premium in default not over six months—if not, later than six months after the due date of any premium in default and provided no previously due premium is also in default, due proof is received by the company [fol. 39] before the insured shall have attained the age of sixty years that the insured was totally and permanently disabled, as defined in the section entitled "Benefits in Event of Total and Permanent disability before age 60", *at the date when such premium in default fell due,* and has been continuously so disabled since said due date, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred."

As this policy lapsed prior to the date Mr. Cooksey became disabled, there is nothing to be considered.

Very truly yours, Thos. P. Morgan, Jr., Manager."

JWF/MEM.

I replied to Mr. Morgan's letter of February 16th, on February 23, 1932 as follows:

"February 23, 1932.

Mr. Thomas P. Morgan, Jr., Manager, Mutual Life Insurance Company of N. Y.,Washington, D. C.

DEAR SIR: I have your letter of February 16th, relative to policy No. 4335,235, on Benj. F. Cooksey, deceased, in which you quote part of the letter received from the Home Office by you, and in reply will state that of course, I cannot agree with the construction put on the policy by the company. As I am going to New York in the next few days, I would appreciate it if you would let me know what department of the Insurance company is handling this claim so I can take the matter up with them and see if we cannot adjust it. I am also calling on you for a blank proof of loss so I can file it in order to bring myself within the company's provisions of the policy.

Very truly yours, —— ——.

EEF-W.

[fol. 40] I received a reply to that letter, dated February 24th, as follows (which letter is introduced in evidence and read to the jury):

The Mutual Life Insurance Company of New York

Washington, D. C.,
February 24th, 1932.

Thomas P. Morgan, Jr., Manager, Southern Building, 1421 H Street, N. W.

Mr. E. E. Johnson, Culpeper, Virginia.

DEAR SIRS: In reply to yours of the 23rd, we are pleased to advise you that the claim under Policy No. 4335,235—Benjamin F. Cooksey, deceased, was handled by,

"Mr. A. H. McKinley, Supt., Bureau of Disability Claims, Mutual Life Ins. Co. of N. Y., 34 Nassau Street, New York City.

Any forms you are desirous of obtaining, will be furnished you upon request at the Home Office.

Very truly yours, Thos. P. Morgan, Jr., Manager.

JWF-MEM."

I signed all of the letters that I wrote to Mr. Morgan myself.

I called on Mr. A. H. McKinley, Supt., Bureau of Disability Claims, Mutual Life Insurance Company of New [fol. 41] York, at 34 Nassau Street, New York City. When I went there I called for Mr. McKinley and was introduced to a gentleman named Mr. McKinley, and I also took a letter with me, but am not sure whether I showed Mr. McKinley the letter or not, but told him the substance of what had transpired and he went and got the records and correspondence that he had and we discussed the case together.

I first tried to settle the case and tried to get them to pay it, but he absolutely refused to consider settlement. I then told him I would have to bring suit and asked for necessary forms for proof so that I could file all the required proofs. In the course of our conversation, something was said about their attorney, and he introduced me to a gentleman that he said was the attorney for the company, and I discussed settlement with him but he refused settlement along with Mr. McKinley. When they finally decided they would not pay the claim, I told them I would have to bring suit against them and again stated that I wanted the proofs. The attorney said "maybe that was not necessary, but if I found that I had absolute proof of his total disability before November 16th, I might talk to him further—then I left. I do not know the name of the attorney with whom I talked, but I think he went across the hall to his office, which was in the same building, am not sure whether it was on the same floor, but I went to his office in the building. The first time I saw Mr. Cooksey was at his home in Rappahannock County, which, as stated before, was a few days before or after December 25th; he was then in bed, and Mr. Browning was nursing him, and his physical condition at that time was very bad.

Q. What about his mental condition?

Counsel for defendant objects to question as immaterial, irrelevant, and incompetent to the issues in this case.

Objection overruled. Defendant excepts for reasons stated.

A. I am not a very good judge of mental conditions. I [fol. 42] talked to him and he was very much discouraged and despondent and seemed to be very much upset about

his condition. As to whether he talked coherently and intelligently, would state when I asked questions he would answer them to his wife, and while I was there, in an abrupt way, he told her to get out, that he did not want to hear her talking, which was entirely foreign to his habits and disposition, which I was acquainted with up to that time. As to his disposition and treatment of his family, so far as I have ever heard, he was a kind and considerate husband, and I was very much struck with the abrupt and brusk way he spoke to her that night. I did not observe anything as to his mental condition not being normal before December, except his despondency, he was the most despondent man I ever saw for a few months before that, at the time when I saw him in my office at Culpeper. I do not think he had been to my office for probably a month before or about December 25th, but before that he was in the habit of coming to Culpeper every week or ten days and he usually came to my office. I never heard any threats from him. As to his natural disposition when normal, would say that he was ordinarily and usually a very jolly fellow and telling jokes with loud laughter, but during the latter part of that summer and fall he seemed to be very much discouraged and apparently not feeling extra good, at any rate, he came there and I talked to him and tried to cheer him up when he came into the office, but I realized that he was very much discouraged. The depression came on and he had it in his head that he just could not make it, and those sort of things, was very despondent, and sometimes I would take more time with him, trying to cheer him up and saying to him that conditions were not as bad as he thought they were, when I otherwise would not have done it. I visited my nephew at the University Hospital, I think, two or three times, and was there at the time of his death and stayed over the day before or the night before that I think. He was carried to the hospital the morning before he died and I stayed there all day, I think that was about January 6th. When I saw him at Christmas time he was at his home in bed. When I saw him at the hospital he was a very sick man. I had a business transaction with him at that time, I had him sign, [fol. 43] my recollection is, an extension note for the premium due on a $2500 policy, but not the policy involved here. I filled it out and asked him to sign it and he tried to sign

it and he just stopped when he was trying to sign his name and said "I cannot do it" and I said "you just rest a while and then finish it" and finally after resting he finished signing his name. I cannot fix the date of that transaction while he was in the hospital. I cannot tell whether he appreciated or knew the contents of the paper he was signing but at that time if you would ask him a question he would answer it intelligently, but every time he would jump like that (indicating), and he would throw his head a little, and it looked like he was trying to get hold of himself; I saw him do that on several occasions and to be frank, I do not think he realized what he was doing at the time, or some time before that, even at the time I visited him in December. I visited him at the hospital three or four times and during those visits I thought he was gradually growing worse. I think that the paper he signed was the next day after Mr. Cooksey went to the hospital, because Mr. Gene Brown, the Agent of that company told me about this policy premium being due, not the one in litigation here. Then we made arrangements about paying the premium. I found he did not have that amount of money in the bank and I thought it was best for him and I had him sign some paper in connection with it, would not say it was an extension note, but it was something that had to be done in connection with the payment of that premium that I had him sign, that was in regard to the other policy. As to whether or not I mailed that to the company, I don't know, because he died a short while afterwards and I am not sure whether I mailed it or not, but it was while he was at the hospital and I think it was a few days after he went there.

Q. Did you have any further conversation with Agent Brown about the premium for the policy sued on?

Counsel for Defendant objects to the question as irrelevant, immaterial and incompetent to any issue in this case, and as hearsay and not admissible and object to any con- [fol. 44] versation had with Mr. Brown; and they must also show that the agent had authority to make such statement.

By the Court: I will let the evidence stay in. I will reverse my view heretofore stated and let the evidence stay in for the time being. As to whether or not it will be stricken out later will be decided at the proper time.

Defendant excepts for reasons already stated.

A. Mr. Brown and I discussed the question of the payment of that premium, he was the agent for the insurance company that I think sold him the policy, at any rate he represented that company at Culpeper. Mr. Brown told me, either in that conversation when we talked about paying the premium on this other policy that if Mr. Cooksey was totally disabled before the 31 days was out that the company would pay the policy if anything happened. I again discussed it with him after Mr. Cooksey's death. I know he told me that he thought the policy would be paid after his death and it is my recollection that he also told me that in case anything happened to Mr. Cooksey that the company would pay the policy, because Mr. Cooksey was totally disabled prior to the expiration of the 31 days. I think this happened when he came to talk with me about paying the other premium before Mr. Cooksey's death. As to when I talked to Mr. Brown, the first time I talked with him was, I think, the following day or the day after Mr. Cooksey went to the hospital.

In response to questions by the Court, witness stated: That Mr. Cooksey had one insurance policy with the Life Insurance Company of Virginia, and another one with the same company.

On cross-examination witness stated:

That is my signature on the note dated January 8th, 1932, signed by Benjamin F. Cooksey and witnessed by E. E. Johnson. Mr. Benjamin F. Cooksey signed that note at Charlottesville, I think the purpose was for the premium [fol. 45] or a loan or something.

(At this point witness read part of the note in question when the Court stated that the witness could state the purport of it instead of reading the whole of the note.)

It is an application for a loan, a loan note, and it was dated back and signed at the University Hospital, the day I spoke of. I think Mr. Brown had the note filled out and I had it signed and the note was dated prior to the date of signature, is my recollection. This was for a loan on the other policy, and my recollection is that it is the paper that was signed, though it is possible that he signed another one.

My recollection is that the premium on Policy 3393,553 had become due and had not been paid, but I am not sure,

I have no clear recollection of what it was done for. It seems from this policy that the premium became due on the 8th of December, and at the head of the policy it says "in consideration of the annual premium of $79.53, receipt of which is acknowledged", I would say the last day of grace on that policy—(p. 43) 31 days, would be a month and a day, wouldn't it. My recollection is that a note was signed at Charlottesville a few days after he went there, a day or two after, and I don't think the premium was paid on the 8th of December, but I am not sure. I am speaking now of the policy that was paid by the company. I think the note was made for a loan from the company to pay the premium on policy 3393-553, and to give him some additional money, I think it was. In handling a lot of business like that, it is hard to recall details. but that is my recollection. I think I explained to Mr. Cooksey the best I could what this note was for, I tried to, because I thought it ought to be done, and his wife thought it ought to be done, and Mr. Brown thought so and we did the best we could. I could not, as stated before, tell you what his mental capacity was when he signed the note. As to whether if he had been mentally incapable of signing this note, I would have let him sign it to borrow the money to pay this premium on the last day, I explained to you a while ago the condition Mr. Cooksey was in, the best I knew how, but I never said that he absolutely did not know what he was doing. I do not know whether he had mental capacity to sign a note [fol. 46] to borrow money to keep this policy in force, I am not a doctor, I am telling his condition and what happened, and I let him sign the note. As to whether I let him sign the note without knowing what it was, or knew what he was doing, I did not ask the doctor his condition, but sometimes he would be able to get hold of himself and know what he was doing. As to whether I told him the note was to pay the premium, on the policy which was expiring, my best recollection is that I told him he needed funds and that premium had to be paid and I thought the best thing to do was to sign the paper. He started to sign it and then stopped and said "I just cannot sign it" and my recollection is he went on a little further and stopped again and said "I just cannot do it", and I said "Go on and see if you can, it will not take long", and he finished it. As to whether he understood what I told him,

I hope he did; he did what I told him to do. As to whether I explained that this was a note he was signing, I explained to him that we thought he ought to borrow money on the insurance policy to meet the premium and give him a little money in addition. As to whether he agreed to it, he signed the paper. As to Policy 3393,553, whether or not it has a disability benefit, it says "amended provisions and additional benefits in the event of total and permanent disability". As to whether instead of borrowing the money we did not file notice with the company and have the premiums waived, I cannot answer that question, we thought it was the best thing to try to keep the policy in force without any question about it. At that time I was not the Administrator and was only a relative, doing the best I could. I have not read the policy, but it has a heading to that effect, I do not know whether they are identical or not, but I think it has a disability provision. It says "Benefits in event of total and permanent disability before age 60, as amended by the addition of provisions set forth hereunder and in no other respect". So far as I know it may have, but I have not read it. I do not know and could not say whether I had seen either of the policies at the time of the conversation, I found them at the bank after his death. I think I was largely governed by what Mr. Brown said about that. The proof of death handed me I made out under the $2500 policy which was paid, that is the [fol. 47] proof of death I made under both policies and they returned this one, refusing to accept it unless I marked out policy No. 4335,235. I sent this proof with the letter I read for both policies. My recollection is Mr. Brown brought this proof of death back to me and stated that Mr. Morgan would require that I mark out Policy #4335,-235, and I marked it out and initialled it "EEJ, Admr." My correspondence was with Mr. Morgan, and Mr. Brown was talking with me about the same time, after that I went to New York and talked with Mr. McKinley and the attorney for the company in person, and the $2500 policy was paid. I stated heretofore that I saw Mr. Cooksey some time along about Christmas, but I could not tell how long prior to that time I had seen him. As to how I know his health began to be affected, Mr. Julius Brown said that Dr. Boldridge told him, according to my recollection, that he gave him a prescription when he came there and the prescription was filled December 4th, to the best of

my recollection, or about that time, and we took that as the date. The doctor told me that was the first prescription filled and we took that as before his illness. As to the information I had when I filled out the certificate stating that the health of the deceased first began to be affected December 4th, 1931, my opinion is that is where I got my information as to the date and we relied on that, and to the best of my knowledge and belief I made oath to that statement, and at that time I thought it was absolutely correct, and I sent that to the company along with the letter attached to it. I have no knowledge of my own as to when Mr. Cooksey became ill. Mr. Cooksey carried an insurance policy with the Life Insurance Company of Virginia and I filled out the proof of death in that case and I think I used the same facts in that as I did in this, that was my information at that time, and being the Administrator, I thought I had accurate information from Mr. Brown but afterwards I talked with the doctor and with the immediate family and I knew then that I was mistaken as to the date of his first sickness. I think I was mistaken as to the facts which I obtained from somebody else, of course, I did not know anything about the facts. As to when I knew differently, I think shortly after I came back from [fol. 48] New York and talked with the doctor—I was in New York, I think, on March 3rd, and after I came back a short while afterwards, I talked with Dr. Boldridge and he examined his records or something and told me differently. I then heard that the first visit of the doctor was November 15th instead of December 1st, as Mr. Brown thought at the time he gave me the information, either Dr. Boldridge or Mr. Brown. When I went to New York I did not tell them that his disability took place on November 15th or 16th. I told them I had not investigated thoroughly but so far as the information that I had at that time, it took place on December 4th; it may have happened earlier than that, but I did not investigate it. I did not state a few days after I went to New York, I said a short while afterwards I got this information, that was what I intended to say. The attorney for the company told me in New York if I could get absolute proof of the disability before November 16th, to take it up with him further. As to whether I got the absolute proof, that is up to the jury, and I have told you what I got. I cannot tell you when this suit was instituted, but if you will give me the

bill I will refer to it. I find that the suit was instituted in August, 1932, or that is what the record shows. I do not recall what date I stated Mr. Cooksey became totally and permanently disabled, but Mr. Miller drew these papers. After looking at the notice of Motion I find it states the 4th of December, 1931. I stated that shortly after I came back from New York I learned that Mr. Cooksey had become totally disabled on the 15th of November, 1931, and as to why I did not make that allegation in August, 1932, I learned from Dr. Boldridge and secured an affidavit from him, copy of which you have, and a copy of which I gave counsel on the other side, to the effect that he visited Mr. Cooksey the first time on November 15th, my recollection is, and at that time we were not sure, I had not investigated it as thoroughly as I have now, and at that time we were probably still of the opinion that his total and permanent disability took place on December 4th. I took this affidavit from the doctor before this suit was brought and the doctor furnished me the information as to his total and permanent disability. As to why I did not use the information that Dr. Bold-
[fol. 49] ridge furnished me, there was a question in our minds as to whether or not he was totally disabled on the 15th of November, or whether or not it was December 4th, and we were trying to allege facts that were absolutely true as best we knew how. Afterwards we changed our minds and decided that disability took place before that, and we have alleged that it took place on or before the 15th of November, according to my best recollection, and continued between that and the 16th of December. I do not think there was anybody more capable of giving us the information than the doctor who attended him, and I relied on the doctor for my information and submitted it, and I got other information than that which made me think probably that total disability took place prior to November 15th or at least on that date. As to whether I gave the Mutual Life Insurance Company of New York that information, I told them in New York that he might have been totally disabled prior to that time, and afterwards, through a New York lawyer, I had a party call on them, I cannot tell the name of the party, but she said she had a party call on them and tell them.

In response to a question by the Court, witness states: I had an attorney in New York go back to them, at which

time I wrote them that I thought we could probably show disability prior to this.

Yes, I have a copy of that letter, which was written before the suit was brought, or on the 4th, 5th or 6th of March, 1932, in the early part of March. This letter was not written to the insurance company, but to some lady lawyer. In spite of the information I had when I brought the suit I put December 4th in the Notice of Motion. As to my former statement that I filed the same kind of proof of death with the Life Insurance Company of Virginia, as I did with the Mutual Life Insurance Company of New York, I think I used the same dates, is my recollection of it. Their questions may have been a little different and I may have answered them a little different but I think they were the same. I think the photostatic copy of proof of death filed with the Life Insurance Company of Virginia, which you handed me is a true copy, it looks like my signature, and which was sworn to by me, and the following question ap- [fol. 50] pears in it with the following answer: "When did the health of the deceased first begin to be affected?" and I said "About December 1st or 4th, 1931."

(Said proof of death above referred to is here introduced in evidence, is marked Exhibit No. 9.)

I stated heretofore that Mr. Cooksey had been despondent all the fall, but he was in bed when I went to see him about the 25th of December, 1931, and had a nurse with him. I sat there and talked with him quite a while about a good many different things. I talked to him about business matters and about his condition and about many things. I stayed there for two or two and a half hours and the main thing I was urging on him was about keeping quiet and not moving around any. He told me at that time that he certainly was having a hard time on account of bad conditions, and every time I saw him in the latter part of the fall and at that time, too, he said he did not see how he could stay in bed because his farm business was going to pieces and all of those things, that he had to go out to work and there he was in bed, a man in the shape he was in, and I urged him that he could not possibly get out and that a man ought to keep his health and reckon on his health first of all. He knew about owing money and that he had to pay it and made sensible answers to my questions. As to

whether he was anxious about his business, that is one thing that leads me to think that probably he was not altogether rational because it seemed to me like he thought he ought to get up and look after things when he was in the condition he was in. Of course, times being bad, and he owing money and had to depend on his business to make the money with which to pay his debts, it was certainly a very natural thing for him or any other man to be anxious about getting out and seeing about it, but it was not natural for a man in that condition to be talking about getting up when he could not hardly get out of bed. He might be regretting it, at least that was my opinion.

On re-direct examination witness stated as follows: The proof of claim submitted to Mr. Morgan, and which was brought back by Mr. Brown, the only thing he wanted, as [fol. 51] I understood it, was that one matter eliminated, and that was eliminated and that is why it appears on the proof as returned, which was offered by Mr. Martin, counsel for defendant, in evidence, and it was in that connection that Mr. Brown, the agent, I think, told me—I do not think that Mr. Brown ever told me that it was not necessary to pay the premium. My recollection is that he came to me about the time we signed the loan note and he spoke to me about the other policy and said it was lapsed, but that he thought on account of his total disability that that would be paid if anything happened to him. That is my recollection and I know he made a statement to that effect after Mr. Cooksey's death. This paper writing "claimant's certificate" my recollection is I handed it to my stenographer and had her copy it and mailed it with the letter, and kept this copy, and it was at the request of the company that I eliminated this paragraph at the top when it was brought back by Mr. Brown. I do not know whether I mailed it or gave it to Mr. Brown and he took it, but that was the copy I kept and I referred to the proof in the original letter, that was the original, and that is my signature there. Mr. Brown brought it back and said Mr. Morgan objected to it because these references were at the top, reference to the other policy, and I eliminated that, and they were willing to pay the other policy, and I marked it out but initialled it "EEJ—Admr"., yes, those are my initials. The figures that are eliminated or stamped out were with reference to the policy sued on here. As to my statement that I gave a copy of Dr. Boldridge's affidavit to the other side, I meant

Mr. Abbott and to your office. I showed the affidavit to Mr. Abbott, and he asked for a copy of it. I took it to you and asked you (Mr. Miller) in Mr. Abbott's presence, must I give him a copy of it and you (Mr. Miller) said "yes", and I gave it to him. I also gave him a copy of any other papers that he wanted.

On recross-examination in response to a question by counsel for defendant, witness stated: That he gave the affidavit to counsel for defendant after the suit was instituted.

Witness stands aside.

[fol. 52] Mrs. Emma (J. E.) Cooksey, sworn on behalf of plaintiff, testified in chief as follows:

I am the Mother of Benjamin F. Cooksey, who died on January 20th, 1932; I live in Rappahannock County, Virginia; my home was about two city blocks from Benjamin F. Cooksey's. For a period of from eight to ten months prior to his death I was at his home every day except when I was away from the place, which was not often, when I would go and spend a short while with my sisters and brothers at their homes, being alone, I did not have anything to keep me at home. When my son was in normal health he was very sweet to me. He had two children and he was crazy over them. His attitude towards his wife was good, he was a very, very kind husband. During the twelve months preceding his death, or along in the springtime he had a spell of rheumatism and I think he was confined to the house about one month, during which time I observed some change in his disposition or bearing. I observed a change in his business qualities and in his disposition, which was not for the better, his disposition was not as sweet as it was before. I noticed this change in his disposition during that sickness. During and subsequent to that period he always seemed to me to be kind and sweet to his wife. I did not observe any change in his treatment or attitude towards any member of his family during that period except when you would speak to him he seemed to fly off and was kind of short in his answers, and there was a change in his physical appearance and his attitude towards his business and his work, he was not just able to do it physically,

he was not able to attend to his business like he did once, and he kept having these melancholy spells, not all the time, but he would be melancholy, and he would sit like he was in the deepest study and if you spoke to him he would fly back like that (indicating), but he would answer, and when he would get in this nervous condition or these spells, he would threaten to kill himself and I really thought he would, and his wife did, too. The first time I recall his making any such threat was sometime along in the summer, I cannot remember the dates. He was very kind to the chil- [fol. 53] dren, more so than he was to me and his wife. His wife told me that he did not sleep any at night, though I was not there at night until later in the fall. As to my observing any change in his appearance or about his face, at different times through the summer I would notice a puffing around under his chin and his toes seemed to be puffed; his hands were swollen sometimes right much. This was apparent to me at different times through the summer and fall. I remember one specific occasion about his making reference to and advising me to take care of the flowers. He got in one of his nervous spells and he came up to my house and was sitting on the porch, and I was sitting on the edge of the porch and he came and sat down by me and said "Mama, I am going to kill myself and it ain't going to be very many minutes", and I got to shaming him and said "a big strong man like you talking like that, with a nice wife and bright children", and he said "Mama, I am going to do it", and I had some beautiful Chrysanthemums in the yard and he said "save your Chrysanthemums Mother, because you will need them". I think that was along about the middle of November, but I cannot remember the dates of these things as there was no special occasion for it at the time, any way, it was late Chrysanthemum blooming time. As to his inclinations to injure other people, once while he was in bed after the 14th of December, he said to me one night, he had a nervous spell then, and he laid there for a few minutes and said "Mama, there is something the matter with me up here, I don't want to hurt anybody and are you all going to send me away from here", and I said "no, son, not as long as we can take care of you". He put forth every effort in the world to push his work, he had great will power, and put forth every effort in the world to keep on, but he could not do it. I know that he had perfect confidence in Dr. Boldridge, who had been his phy-

sician, I reckon, for fifteen years, he had been the family physician for fifteen years, he waited on his father when he died nearly eighteen years ago.

Q. Do you know whether or not during that period your son was able to understand business matters?

[fol. 54] Counsel for Defendant objects to the foregoing question because it has nothing to do with the contract in this policy and it is immaterial, irrelevant and incompetent as to any issue here involved.

Court overrules objection and Defendant excepts for reasons already stated.

A. Some days he was and some days he was not, up until the 15th of November, and he was sick for a few days before that and we called the doctor on the 15th of November, the first call, and he was utterly incapable of attending to business, mentally and physically, because he was down with a bad case of "flu" at that time. I certainly do tell the jury that from November 15th on or I will say that on November 13th, he was incapable of attending to business, I was right in his home then for nearly a week, during the daytime, but not at night then. A nurse was employed on December 14th because he got so that we could not manage him, he got so nervous and he just cried and hollered and would not do a thing we wanted him to do and we could not do anything with him and we just sent for the nurse, Bob Browning, who was on a vacation and lived about half a mile from home. My son told me about attempting to attend to some business, I was not with him, but he told me "Mama, I laid down on the log all day". I think that was about the 3rd of December.

On cross-examination witness stated:

My son had a sawmill up above his home, and I think he went to the mill with some men to cut out logs about the 3rd of December, the reason I fix the day is because he came home so ill that night and called the doctor on the phone and we got some medicine and the medicine bottles are dated the 4th of December. I looked at the medicine bottles and gave him the medicine up until Mr. Browning came. We called the doctor the next morning after he came back from the sawmill, and the medicine bottles show that

[fol. 55] that was on the 4th of December. Before that time he had not been going out with his men, he had been practically in bed. He went with the men on the third of December to the sawmill camp, but he didn't eat breakfast and had not slept any the night before, she told me. I could not tell you the last time he was in Culpeper, but I expect it was some time about the first of November. As to how I fix the date, 15th of November, when he was sick before, on the 17th he and I went to Washington, D. C., in the truck, we carried some apples and he was nervous and would not go by himself and I went with him, the apples were in baskets. The reason I remember it was November 17th, is that we had some friends to see us on Sunday and we made plans to all meet in Washington on the 17th. My son and I and some friends in Alexandria planned to go on the 17th. We made the plans at home and my son was present. These friends were visiting in my home and he was there. We did not meet these friends in Washington on the 17th, because they did not come, the lady had a sick child. I suppose my son put the apples we took to Washington in storage. He drove the truck but he was so nervous that I was persuaded to go with him. I did not go with my son or anyone else on the truck after the 17th of November, he was not out in the truck to my certain knowledge after that time, except when they went up the mountain that day, December 3rd, when my son went in the truck up the mountain. I think one of the boys working on the farm drove the truck at that time.

Witness stands aside.

Mrs. Ethel Cooksey, sworn for plaintiff, testified in chief, as follows:

My name is Ethel Corbin Cooksey, I am the widow of Benjamin F. Cooksey, the insured here. I live at Amissville, Virginia; two children were born as the result of our marriage, the oldest is ten years old and the youngest is eight years old, they were six and eight years old when he died. Mr. Cooksey was in the business of farming and he [fol. 56] owned a farm of his own. For one year prior to his death or up to a year before his death he had good health. I noticed a decline in his health in the spring of the year he died, April, he was sick the whole month of

April, 1931. I first noticed that his health was failing him because he was under the doctor's care all of April and he was going to the doctor and the doctor came to see him and he was taking medicine and the doctor said there was poison in his system, and at night he suffered and didn't rest in April. I also noticed a difference in his demeanor and conduct towards his family, myself and the two children during April. He was always good to the children and kind to me but at times he would get fractious after April and he was never real well until Fall, he got better, but he was never well. On November 15th the doctor came the first time. I sent for Dr. Boldridge, because I knew he needed a physician and he was sick and not able to work and did not get any better. His mental condition on November 14th and 15th was not like it had been and he did not seem to be able to tell how he complained. He dozed and I have seen him grab the bed at night and just shake it and yet he could not tell you how he complained, but his nerves were all to pieces. After November 15, 1932, I heard him make threats, I heard him say he would kill himself. As to his demeanor towards the children, he was always good to them and he thought a lot of both children but after he got real sick he could not stand any noise in the room where he was. He was in bed on November 15th but he did not stay there all the time; he was out after November 15th but he should not have been, he was never well any more and he forced himself to be out, I mean that he was not able to go and should not have been out. He went to bed on December 4th, he was probably up between the 4th and 14th of December, but was never able to work. During that time he would be out part of the time but he was not able to work. When I would call his attention to shaking the bed, I would ask him "what in the world was the matter and how he suffered" and he would say he could not tell me, and I have heard him say that he believed he would get up and go out and kill himself, and these statements in regard to destroying his life were very frequent [fol. 57] that fall. He was never up out of bed after December 14th. Myself and my mother stayed with him and looked after him and Mr. Bob Browning nursed him from December 14th for a week. We sent for Mr. Browning to nurse him because we could not do a thing with him. We sent for the doctor first and when the doctor left we could not do a thing with him, he would not stay in bed and he

would not heed anything we told him and he would bless us out. From my observation of him and contact with him, he was not able to pursue his work at that time, and do not think he was capable of looking after his farming operations at any time during November, because he was not well and he would get up and go out and try to work but he would have to give up. He would come back in the room where I would be cooking, and would say "I just cannot stand the thing, I am worn out, I feel like I would like to take a long trip, I cannot stand it, I would like to go to Florida", and I would say "if you feel that way, why don't you go." He has never been to Florida and has never taken an extensive trip anywhere. Yes, I testified to what his condition was on November 15th and his physical and mental condition on the 4th of December following was worse, he gradually grew worse all the time, he never improved any. I would say that he was not in possession of his mental faculties on the 14th of December, at the time he went to bed, and he never got up—do not think he knew what he was doing all the time, do not think he was capable of looking after his farming operations, it would tear him all to pieces if he tried to do anyth[illegible]g. Yes, I know Mr. Jules Brown, Agent of the defendant insurance company, he came to our house the day after they carried my husband to the hospital and he seemed to be shocked when I told him they had taken him to the hospital and asked how long he had been sick and I said he had been sick for months, very sick, and Mr. Browning had nursed him, and he asked about the insurance, and I got all the mail I could find and gave it to him and he looked over the letters and he found this notice from the company, and he said "I wish I had seen this sooner"; he said "he is totally disabled before this was filed, I know, I can fix it all right, I can fix it all right", that is what he told me when he left my house.

[fol. 58] Counsel for Defendant object to the evidence of this witness on grounds heretofore stated, in reference to the authority of Mr. Brown.

Court overrules objection, and defendant excepts for reasons heretofore stated.

I was at the University Hospital when Mr. Cooksey died, I got there the morning before at five o'clock, on the 20th, I was there the Sunday before he died and again the morn-

ing before he died, I was home with the children and his mother stayed at the hospital with him all the time or in Charlottesville. He was 42 years old when he died, and was 32 years old when we were married. As to what I meant when I said "blessing out", at times we would ask him things and it would seem to tear him to pieces and he would just bless us out, and one night I had not been in the room with him five minutes and had not said half a dozen words to him when he said "Ethel, get out of here, you worry me to death hearing you talk," things like that. That was after December 4th, but do not remember the date. I first noticed that his demeanor towards me and the children began to change in November, from the first of November, and before he began to change he had always been a good kind father, he was devoted to the two children and myself. I noticed the swellings about him several days before the doctor came, and on the 15th of November, the swelling was worse than it had ever been, you could notice that his hands and face were swollen,—no, it was in December that he had the worst swelling, but there was some swelling in November, but it was not so bad as later, it was worse between the 4th of December and the middle of December. I would not say that Mr. Cooksey was competent, mentally or physically, from December 14th, of looking after his farming or doing any gainful occupation, and I do not think he was capable of looking after his farming especially from the 15th of November until the 4th of December, not at all, he tried to go and did go out but he was not able to, he should have been in the house. I know that he came from the sawmill one night in November, do not remember the [fol. 59] date, but he went to bed and had a chill that night and said he had not been able to work all day, that he was sick. I noticed that his health was bad from November 4th until December 4th, and he was not capable of attending to any business, and from December 4th to December 14th, he gradually grew worse, and was not competent to do anything after December 4th.

On cross-examination witness stated as follows:

I stated that my husband was sick the entire month of April, 1931, and under the care of Dr. Boldridge——

(Counsel for plaintiff at this point stated he had overlooked a question and the following evidence was given for and on behalf of the plaintiff:)

Mr. Cooksey always had perfect confidence in Dr. Boldridge, who was our family physician ever since we were married, and there was no time since he had been our family physician that Mr. Cooksey declined to take his advice.

(Continuation of cross-examination:)

Yes, I stated that Mr. Cooksey was under the doctor's care the entire month of April, 1931,—I will not say entirely, but it was about a month, just about the whole month of April, and he was not able to work. I think I know my husband's signature if I was to see it. This is my husband's signature to the paper which you handed me dated November 5, 1931.

(At this point court and counsel retired to chambers and discussed the propriety of introducing the paper above referred to and after some argument, counsel for defendant decided that they could use it at another time. Said paper was marked "Exhibit X—Mrs. B. F. Cooksey, for identification only.)

I do not know how many times the doctor was to see Mr. Cooksey during the month of April, 1931, but he went to [fol. 60] the doctor's office some, too, I really could not give you any idea as to how many times the doctor came to see him, but I have the medicine bottles at home with some of the dates on them. Mr. Cooksey had a large orchard and the apples were gathered in October and November, and he was out there some when the apples were being packed in November, but he should have been in as he was not able to work. Yes, he stayed out there with the men gathering apples some. He went to Washington some with the apples when they were hauled there, but he didn't always go. During the picking and packing of his apples during the month of October and part of November, he was out early and late and from November 15 to December 4th, he was in and out some, but I really do not think he should have been out at all. While he was out he was directing the work on the farm, and trying to work himself. Prior to December 4th he and several men went to a logging camp to work, I don't remember the exact date, but one day he laid on a log all day up there and said he was not able to work and he came home and went to bed and had a chill that night,

do not remember just the date. From that time until December 14th he was up some, in some and out some, but I think he should have been in bed all the time; when he was up and out he was looking after his farm and his work and he was directing the men he had working for him and doing what he could himself some, at times he would and at times he would be in, he was not out every day but some days he would be out and some days he would be in, he forced himself to go as long as he could, Mr. Cooksey was always a hard working man, he was as hard a worker as any man I ever saw, he has worked early and late ever since I have known him, and ever since we have been married he has been a very hard worker. Between the 4th and 14th of December, he might have gone to Culpeper in a truck, he was out some between those dates, but I don't remember whether he was out with the truck himself or not. I stated he was always very kind and considerate of his children, and was kind to me except when he was sick, he was nervous and irritable, he would just get torn all to pieces, and didn't know what he was talking about or what he was doing, he was really worried. From December 4th to [fol. 61] the 14th he paid his men who worked for him, I believe he wrote most of the checks himself. I wrote some of the checks for him after he was in bed, but as long as he was able he would do it, but I paid some of those men myself rather than worry him, don't remember the dates I paid them, but I paid some with money that I had of my own rather than worry him by asking for a check because it worried him. I think he signed most of the checks that were given between the 4th and 14th of December, probably all of them. I stated that we sent for Dr. Boldridge on the 15th of November because that was the day that we called him and he came there. Mr. Cooksey and his mother went to Washington, D. C. on November 17th in the truck. As to how I fix the date that I sent for the doctor, November 15th, Ben had been complaining all the fall and he seemed worse and we sent for the doctor and the doctor gave him some medicine and told him he had the "flu" and to take it and stay in, but you could not keep him in, as long as he could go he would go, don't know how I remember it was the 15th, rather than the 13th or the 16th. I remember about them going to Washington in November, but don't know how I remember the day, but I know we called the doctor on the 15th of November, I cannot tell you of any

way that I have of remembering that date, I haven't any evidence other than the dates I have on the medicine at home, but I think the doctor does, and it was the 17th that they went to Washington. I fix that day because in talking about it afterwards his mother said "we went to Washington on the 17th", and I remember the day they went and I believe it was on Tuesday, the 17th of November, and the 15th of November would be on Sunday if that was on Tuesday, and I called the doctor on Sunday the 15th, I think it was Sunday the 15th, I guess it was, I declare I don't know what day it was on but we called the doctor on the 15th, we will ask the doctor what day we called him,—and the way I have of fixing the date is I believe Mr. Ed. Johnson was there, too, we had company, and he was there, and Mr. Cooksey said at first that he would go and see the doctor and we said "no, we would call him". He was not able to go and see the doctor then, and the doctor said when we called him not to let him go. Yes, he was able to go to Washington after- [fol. 62] wards,—that was afterwards, and the doctor didn't tell him to go, and he should not have gone. Yes, he went, but he was not able to.

Witness stands aside.

R. L. Browning, sworn for Plaintiff, testified in chief as follows:

I live in Rappahannock County, Virginia, and have all of my life; am 64 years old; am a practical nurse by profession for men; I do anything that doctors prescribe; I look after my patients and stay with them; have known Benjamin F. Cooksey, deceased, all of his life; was sent for to look after him during his last illness, I went there on December 14, 1931, and stayed one week, leaving on the 21st. On the 14th of December, I considered Mr. Cooksey a critically ill man, very ill; he was at his home in Rappahannock County, in bed. His general condition led me to the conclusion that he was a very ill man, and he would suggest something to eat and could not eat it, or would not eat it, and they sent for me because they could not manage him. On one occasion he called for ice cream, but he did not have any appetite. I stayed with him day and night. I saw a difference in his mental condition during the week I stayed

with him from his former condition when I knew him in good health, he was flighty at times and sometimes in his condition he would suggest that he go out the next day to work, that he would have to do something, which he ought to know he could not do because he could not have worked the next day. In my judgment he was not mentally or physically able to look after the farming operations or any employment for the seven days I stayed there, he was too weak to perform any physical labor on the farm and I do not think he could carry on any business, his mental condition would not fit him to do any business during the entire time I was there, December 14 to 21st. During the time I was there I never saw any change in him for the better, he would get worse all the time. As to any threats that he made during the time I was there, he remarked that he [fol. 63] would be better off dead, or wished he was dead, but I do not think he knew what he was talking about during the whole time I was there, especially when he threatened to destroy his life. Mr. Cooksey weighed about 160 pounds. When I got there he was swollen in his face, hands and feet. He did not seem to talk much about his condition, but he asked me when I thought he would be able to get out. I do not think he appreciated his real condition. He rested very, very poorly at night. I hardly know what he complained of, he did not complain of any particular pain but was just restless all the time, he was very nervous. As to his conduct and demeanor towards his wife and children, his wife was not in there much when I was there, I never heard him say anything much to his wife, I was in there by myself most of the time. His hobby appeared to be to get out and get at something, and I would say he was not able to attend to it if he got out. As to my experience in nursing men, I nursed for a while at the St. Elizabeth Asylum and I do not know that I can recollect all that I have done. I was at the St. Elizabeth Asylum for 9½ years, and left there in 1906; have been nursing patients in my community and surrounding community. St.. Elizabeth Insane Asylum is located in Washington.

On cross-examination witness stated as follows:

Mr. Cooksey was a very hard-working man; I never heard of his having any illness that would put him down before. Any man that has been a hard working man all his life and gets sick he naturally wants to get out and he

will get out when he probably ought not to do so. I have frequently seen patients who would ask for something to eat and when I brought it to them they could not eat it, and sometimes I have not; it seemed to make him sick when he started to eat, which is a very unusual thing. I have been sick myself and when I wanted anything to eat I would eat it. It is not unusual for a man to think he wants something to eat when he is not well and when it comes he does not want it. I have heard, I believe, people say that they wished they were dead or they would be better off dead. Have never nursed anybody with a stomach ache. Have [fol. 64] nursed fellows getting over a bad drunk but he did not make any statement but he got off it. While I was there Mr. Cooksey was not very communicative, but at times he was intelligent and at times he was not; he did not ask for much, but I often suggested if he wanted anything. I stated that he talked with me about his condition and when I thought he would be up, but he knew he could not get out; Did not know when he could get out. He thought of me more as a nurse and asked me those questions. I stated I went there on December 14th and left in one week, and left because they said they were not able to pay a nurse. After I left his Mother and wife stayed with him. Mrs. Cooksey paid me when I left, in money. As to how I fix the 14th as the day that I went there, I do so by the time I was at my old home. I had been away and his mother came to get me to help nurse him and I came back to my home on the 21st and a few days before Christmas I came to Culpeper as they didn't need me and that is why I know when it was. I came back on the 21st of December. During March, April and May, 1931, I was in Marshall, Virginia. Went to Marshall the 17th of March, 1931, and came from Marshall the 17th of August. Was in Rappahannock County from the 17th of August on, but not in that part of the County, I was up near Sperryville. I was in that part of the county from January 1st until March. I rarely ever saw Mr. Cooksey during that time, but I saw him in March, 1931, and January and February.

Witness stands aside.

Dr. A. G. Gilliam, sworn for Plaintiff, testified as follows in chief:

I am located in Baltimore at the present time; am 28 years old; studied medicine at the University of Virginia, was there in the Medical School for four years and one year as an intern; graduated in 1931. I am a physician and instructor in the John Hopkins University. I first became acquainted with Mr. B. F. Cooksey on January 11th, 1932, he was on the ward of which I had charge, was not [fol. 65] acquainted with him before that time. I first saw him at the University of Virginia Hospital, where I made an examination of him. Mr. Cooksey was suffering at that time from acute nephritis and early uremia. Acute nephritis is acute Bright's Disease and uremia is intoxication due to loss of the function of the kidney tissue. As to how the two complications I mentioned affect the body and mind of a patient, or Mr. Cooksey, upon examination or admittance Mr. Cooksey was rather quiet. Upon attempting to question him and get the history from him his answers to questions were rather sluggish. At times his answers were somewhat inconsistent. You would ask the same question on different occasions, and you would get a slightly different answer in certain details. It seemed to be rather obvious that his memory was rather poor, and it was difficult for him to concentrate and give proper answers, although he was co-operating apparently or attempting to do so. I first saw Mr. Cooksey on January 7th and he died on the 20th. Saw him several times daily between those dates. His condition did not improve while he was there. At times he was somewhat brighter than he was at others, but his whole general condition was progressively down-hill. As to whether he was capable, mentally or physically, of following any occupation or giving intelligent advice to anyone following the occupation of farming during that time, I am quite sure he would have been unable to attend to business of that sort, physically and mentally. He was confined to his bed all the time he was at the hospital. As to whether I made any written memoranda each time I saw him, it is our usual custom for an intern to write the progress of a case at least once a week. For very old patients it is sometimes written more frequently. I wrote progress notes, but I cannot tell you exactly how many, do not know how many. Then at the discharge of the patient or in this case, at his death, it is customary to write what we call a final note, in which instance we summarize gen-

erally the findings of the patient during his stay in the hospital. I have those notes with me here. Part of that writing is mine, and I will read from these notes: On admission, the patient's blood urea, which is a chemical test to determine certain abnormal—certain quantities of abnormal constituents in the blood, was seven or eight times [fol. 66] what it is normally, and a patient with as high blood urea as this—I might say that a case of this kind is a fair index of the intoxication due to Bright's Disease. If the patient had developed that high blood urea suddenly, he would probably have been in convulsions or he would be probably in convulsions. As to whether I could say it came on gradually, I cannot, except from that inference. All of this memoranda and writings in this book are relative to this patient, but they are not all in my handwriting.

(The foregoing hospital record is marked Exhibit No. 10 and is here certified to the Circuit Court of Appeals.)

In the diagnosis, page 1, I have these words: "Nephritis, chronic without edema 33-129", which is merely a number we have for the purpose of the card index at the hospital. Nephritis is progressive kidney inflammation, commonly known as Bright's Disease, Chronic, as the name implies, and "without edema" means with no swelling or no collection of blood in the tissues. Acute uremia, as I said before, is intoxication induced by insufficiency in the functions of the kidneys. That diagnosis is made in co-operation with the whole medical staff. The diagnosis made on the death certificate was "acute exacerbation of Bright's Disease and Uremia." That is an acute flare-up and chronic or long standing Bright's Disease and Uremia, and at the particular time he had an acute flare-up of it. The initials "P. I." means Present Illness; the initials "Pt." means patient. The letters "L. M. D." means the family physician. "RX" is the symbol for treatment, which is the common symbol used by hospital officials. The word "Reiber"— each ward patient admitted to the hospital is assigned an intern- who is in direct charge of that ward. In addition to that an undergraduate student is assigned the patient and does work on him, but he has no authority in his treatment. Reiber was such a student, but I do not remember his initials, it was Dr. Reiber, who graduated this year and I do not know where he is at the present time.

On cross-examination witness stated as follows:

[fol. 67] The words "admission notes" which gives the mental history, past history, habits, occupation and things of that kind—I might say here that the notes you have are not mine, but my admission notes is a summary of the information of the sort you mention, which I considered important, and that was obtained from the patient, except I believe, in one instance. I did quote also one statement which was attributed to either the Mother and in another instance to an Uncle. As to where I got the information or past history: "Generally he has enjoyed excellent health up until the present illness. His Mother said his face was puffy before. He had a bad attack of influenza in 1918", those are not my notes but I have a history of the patient that he gave to me in my notes as follows: "The patient has been confined to bed nearly four weeks, having been treated by family physician for acute Bright's Disease. Sickness started six weeks ago when his work as a farmer was 'slowed up' because he felt weak all over and like he had a 'cold' or 'grippe'. There was no actual sore throat or cough, but his chest felt congested. He felt 'sore all over' and finally called him family physician, who gave him some pills. Soon after he was puffy about the face and eyelids and began noticing scant and highly colored urine. The family physician said he had 'blood casts' and hence 'acute Bright's Disease' and put him to bed. Treatment consisted of neg. sox. (epsom salts) and diet. During the past week or ten days he has been vomiting nearly everything he took, so family physician sent him to the hospital. Previous to present illness, patient had been in good health. His Mother says, however, that she is afraid he has had nephritis before, because his lids and face have previously been puffy. Recently in his work in the orchard he has been spraying trees with lead sulphur and arsenic preparations. He has, however, had no colic or diarrhea. (Infrequent attacks of abdominal pain and constipation). Patient is quite sluggish in his responses and is 'just tired and wants to be let alone'. Breath is quite foul but 'not as bad as it has been'. He has comited for the past week (can be with relation to epsom salts?) No ocular symptoms of uremia or mental symptoms beyond sluggishness". I secured all of the information in reference to the patient's [fol. 68] former history except where I say his Mother said

she is afraid he has had nephritis before because his lids and face were puffy. I also have in my "final notes" a statement attributed to his Uncle, that a physician told him previously that he had Bright's Disease. The patient did not give that information. On January 12th, in "Progress Notes" I say "Patient vomits after taking neg. sox." "Complains of twitching of muscles of arms. Mentally clear". As to whether the patient was in condition to understand what we were talking to him about on January 7th, I would say to an extent, yes, sir, he knew he was in the hospital, he recognized me, not by name, but certainly as a physician, but, on questioning him, and attempting to get his history, he was not at all consistent. In asking the same question at different times, he would give different answers. That is why we have in the Admission Notes, the "on-set" dated four to six weeks before admission, because he would say four one time and six at another. His memory was cloudy and somewhat hazy about dates or as to how long he had been sick, which was something you would have expected him to remember. As to whether he was mentally clear on the 12th, there is another statement similar to that in the Progress Notes that, since it is a subjective symptom, I think demands some explanation. In a patient of this sort, what we are looking for and trying to prevent is on-coming coma, and certain other nervous manifestations. When I say "mentally clear", the patient, as I said before did recognize people and knew the time of the day, although the day before the second statement of mentally bright or clear, he was completely dis-orientated and did not know the time of day. He was mentally clear to the extent that he could tell the time of day and knew people about him; and he was not delirious or suffering from hallucinations, as those patients sometimes do, and since that is a subjective symptom, I think it demands an explanation. What I had in mind was on-coming coma, and he showed no evidence of developed coma during the night. As to whether if he had a note due at the bank and some of his relatives came to him at that time and told him that his note was due at the bank and wanted to renew it, he was mentally clear enough to understand that and sign the [fol. 69] note, I want to answer fairly. In my judgment or opinion, his judgment was so clouded that, if he had signed the note, I do not think hardly then he would have understood the significance of the signature, that is my

opinion. As to what day it was that he would not have understood an ordinary matter of signing a note or doing some other act in connection with business matters, in my opinion, he was from the time of his admission.—at least from the time I first saw him until his death, his judgment was so clouded that he could not really understand the significance of business matters. If he did sign a note in a business matter I do not think he could exercise good judgment. As to whether he was capable or incapable of making an intelligent statement, he undoubtedly did make intelligent statements. Some of his history there is undoubtedly correct. He was capable of making intelligent statements not requiring good judgment, I should say, not requiring certain fineness of judgment. I do not know of my own knowledge the condition of Mr. Cooksey prior to his entrance to the hospital and any opinion that I might give as to his condition prior to his entrance to the hospital, is an opinion, but I think there is very good basis for the opinion, and I might be mistaken.

Witness stands aside.

Dr. J. C. Flippen, sworn for Plaintiff, testified in chief as follows:

My residence is University, Virginia; am 55 years old. Have been at the University of Virginia as a student, instructor and a professor since 1898, continuously. My official title is Professor of Clinical Medicine and Dean of the Medical School. I had graduated in Medicine, I spent the first five years of my medical career in laboratory work—pathological work and went into clinical medicine, that is, what is known as the practice of medicine, and have been in that ever since. I have studied in most centres in this country and in Europe. I knew Mr. Benjamin F. Cooksey and came in contact with him while he was a patient at the [fol. 70] University Hospital. I think I first saw him in January, 1932. At that time I had charge of the Medical Wards. Of course, I had charge of the Medical Wards all of the time, I am at the head of the Wards, but we divide that service, and during part of the year my associates look after the details and I make the rounds with them once or twice a week, but at that time I had direct charge of the wards myself, and saw Mr. Cooksey from one to three times

a day. I think Mr. Cooksey was there from the 6th or 7th of January until his death on the 20th. As to Mr. Cooksey's condition during that period, he was referred to the hospital for treatment by Dr. Boldridge, with the diagnosis of nephritis, that is, Bright's Disease, disease of the kidneys. When he came to the hospital, upon examination we confirmed that opinion, that he was suffering from a poisoning resulting from diseased kidneys, what is known as uremia, which is a condition that is a manifestation of insufficiency of the kidneys to perform their proper functions in the body, which results in the poisoning of the system; he had the symptoms, signs and manifestations that are characteristic of that condition. As to what effect that condition has on the intellectual processes, would say, the manifestations of uremia are variable, but perhaps one of the most constant effects is the effect on the nervous system. It depends on how fast it comes on, as to what its manifestations will be. If it comes on gradually, the affected person will have mental depression, mental irritability, mental cloudiness, and finally they go into a coma, they become unconscious. In those cases where it comes on suddenly, or if it has been present for a long time and becomes severe or acute in its manifestations, they become wholly unmanageable. In other cases we have hallucinations and illusions, but in practically all cases there is some effect upon the nervous system. From my observations of the patient, and such knowledge as I could acquire of the history of his case, I would certainly say that he was incapable of engaging in a gainful occupation, either physically or mentally, he was a very ill man.

At this point the following hypothetical question was submitted to the witness:

[fol. 71] Q. Assuming, doctor, that this man, or any man that was in the condition this man was in—that you saw this man in—assuming these conditons, and your observations to be true—assuming further that in good health and normally this man was energetic, industrious, bright, kindly, affectionate, with his children, and interested in life; assume that he had an attack in the nature of rheumatism, which kept him confined to his home for practically one month, during the month of April preceding the time you did see him; assume that, while he recovered from that attack, apparently, he gradually grew morose

and was worried about business trouble; did have actual business troubles; assume that his attitude towards his wife changed to a degree—not cruelty but lack of consideration, you might express it; that at intervals during that period, down to November, there were recurrences—evidences of swelling of the joints of the hands, and recurrent swelling about the face and the eye-lids, I believe—not pronouncedly so, that a stranger would observe it, but still observable to the members of his family; assume further that his family insisted on his having medical attention, but he would not; that they sent for his physician—his family physician—in whom he had the greatest confidence, and that he was advised that he was a very sick man and should not engage in activities and should not worry about his business affairs, and yet he did continue to do it, and, instead—against the advice of his family and his physician—he attempted to do work beyond his physical capacity; that that situation developed about the 15th of November—on that occasion his physician gave him that advice; assume that his physician did not see him again until the 4th of December, at which time he pronounced him as being subject to this kidney trouble to which you have referred. Assuming that he refused to take or would not follow the advice of his physician and his friends—his family friends—that that condition grew gradually worse, and that that disposition grew gradually worse, during which period he would threaten to take his life, and that that continued down until the 14th of December, at which time his family found it necessary, in order to physically control him, to put him in charge of a male nurse, who had had experience in Saint Elizabeth's Hospital, a county hospital; that through that period he [fol. 72] appeared extremely nervous; that when asked questions, he would, on occasions—not always, I believe, but markedly at times, jerk and give physical evidences—jerking and nervousness in that respect—throw his head back; that he would be sleepless at nights and would grab the bars of an iron bed, I believe, and shake it so as to jar the bed and the occupants of it; and, when asked what the trouble was, he would state that he did not know what it was; that on other occasions, or on another occasion at least, he said there was something the matter with his head, and that he did not want to hurt anybody, and he felt an inclination in that direction; that, following that, this

nurse was with him a week and his services were discontinued on account of the inability of the family to furnish funds to keep him there; that during this period he expressed a desire to take a trip to Florida—a place he had never been—he had never been away from home on any protracted trip; also assume that during that period—the period from November to say the middle of December—from the middle of November to the middle of December, he did from time to time attempt to direct the work on his farm, at a time when his family thought he should not attempt to do so; that he did even drive a truck to Washington, D. C., with a load of apples, I believe, on the 17th of November, but was so nervous that his mother—who was with him—was fearful of the results of the drive. Now, coming back, and following the time of the discharge of the practical male nurse—from that time until the 7th of January, his condition continued to grow worse, and he was never able to leave the house after that period—up to the time he was taken to the University of Virginia—and that was followed by a history of the case as shown by your chart here (indicating): would you be able to express an opinion as to the extent of that patient's disease or the duration of that patient's disease, prior to the time you saw him at the hospital?

To which question the witness gave the following answer:

A. You have asked me a very involved question: The best answer to that question is the diagnosis of the chart—that this man had chronic nephritis—not acute but chronic nephritis. We arrived at that with some difficulty. It is, [fol. 73] as you might think, difficult, in getting at the truth of things—we have to go into a discussion of the history. This man was not mentally clear when he came to the hospital. We had to question his family and relatives in order to get at the trouble in the matter, and, after going through these questions, we were of the opinion that he had had this nephritis longer than the immediate illness would indicate. That was based on certain facts that in all—I did not know all of these facts, but we knew enough to lead us to believe that he had them. Also, it will be noted on the chart that when he came to the University Hospital, his blood urea was 200. That is the best indication we have of uremic poisoning. If that comes on

suddenly, it is usually accompanied by convulsions, but if it comes on gradually, as every poison in small doses is gotten from time to time, the patient can stand it better. Therefore, lack of these manifestations would lead us to believe that it developed gradually, and, answering counsel's question, it is my opinion, that this man had chronic nephritis. When it started, it is impossible to say, but I believe it ante-dated the first attack in November, and probably by some months.

Assuming the truth of the statement of fact that counsel has undertaken to detail to me, I do not think the man was capable of engaging in a gainful occupation, either physically or mentally, during the period from November 15th on, from the condition he was in when he came to us, he certainly had been in a state of uremic intoxication for quite some time. During the period of my observation he certainly was not capable of business judgment or forethought. As to my opinion of his capacity to exercise business judgment and forethought for a period ante-dating his coming to the hospital by as much as thirty days, that would be more difficult for me to give a direct answer to. If I knew the character of the medical evidence as to his condition during that time, I might have an opinion on it, but you have described symptoms that are frequently seen in the early stages of uremia, that is, mental irritability, and probably inability to concentrate—depression—those things often—did you mention depression? I used the word "inability to concentrate" and I was rather reciting the symptoms of uremia rather than any knowledge that I have of his symptoms; but all of those symptoms would [fol. 74] indicate that he was gradually developing poisoning from inability of the kidneys to excrete, and that would certainly affect a man's mentality in the sense of affecting his judgment, or rather his initiative.

On cross-examination witness testified as follows:

In response to the following hypothetical question propounded by counsel for defendant:

Q. Dr. Flippen, if this man owned a large apple orchard, and, during the sumer of 1931, operated it—had men helping him—and in October superintended it and worked there himself and gathered the crop—looked after it in October, and in November took the crop to Washington, D. C., and

stored it, and things like that, do you think he was totally and permanently disabled or incapacitated in transacting his farming operations?

A. It is a question as to whether or not he was totally and permanently disabled? That is not the question I had, that is a new one, as to totally and permanently unable to handle his farming operations, he certainly could handle some if he did what you say, yes, sir, but I do not think that upsets the diagnosis we put down here we stand by the diagnosis, in view of the facts thus far presented. I stated he was totally incapable of carrying on his business during the period I saw him at the hospital, and the evidence we got at that time would lead me to think that he had a chronic nephritis and he had gradually accumulated the poisoning in his body that was capable of affecting his business judgment for a period preceding that time, as to how long, I cannot say. As to whether he was capable of making an intelligent statement when he came to the hospital, we had great difficulty in getting a history, a connected history from him. I do not think he was capable of making an intelligent statement about his history and his condition, he showed himself incapable of giving a connected statement of his illness, but the statements he gave us as to his habits, occupation and past history and things of that kind were worth something, and I did not say they were not worth anything, it need not be one or the other, just in between. The man could tell you certain things all right, but he would leave out things or would get confused, so he could tell you certain things about his history and [fol. 75] certain other things he could not tell you, he was capable of giving a part truth. I had never seen Mr. Cooksey before he entered the hospital to my knowledge.

The following questions were propounded to the witness by the Court:

Q. In 1931—December 15th or 16th—which was three weeks before you saw him, one of them, and the other something over three weeks, could you say, from your observation of him when he came to the hospital on the 7th of January and gave this history, would you be prepared to say that, on the 15th of November preceding, he was not capable of attending to the ordinary business transactions, from the standpoint of mental ability to do so?

A. I cannot answer that in the same degree of exactness that I can answer that that at the time I saw him, but, taking all the facts into consideration, I believe that the man having had—I believe it was the 5th of November—he had an acute exacerbation—that is to say, an acute flare-up—of the condition in his kidney that existed before, I think there is certainly a strong probability—a strong probability—that his business judgment would have been very considerably perverted, from my experience in similar other cases.

Q. As of November 15th, you think so—seven weeks before you saw him?

A. Yes, sir; I don't know that, but that is my judgment.

Q. Not involving the exercise of any judgment, but exercising or involving a knowledge or understanding of the nature of the transaction?

A. I don't know whether I exactly get your shade of meaning there or not.

Q. Say this man had an insurance premium due that day. Do you think he would understand that it was important for him to pay the insurance premium, or that he knew what he was doing when he did it?

A. Yes, sir.

Q. Any person with sufficient understanding, that has insurance, would keep in mind whether or not they have a premium due. Do you think he had sufficient understanding, when he got notice, to keep it in mind and understand that it was important to be paid?

A. I think probably he would have an understanding of that, but I don't know.

[fol. 76] Q. That is quite natural, not seeing the man, but what I am getting at is this: Are you prepared to say that he did not have that understanding?

A. No, sir, I am not prepared to say that he did not have that understanding, though he very well might have been in the condition where he could not appreciate it.

On re-direct examination the witness stated as follows:

From my observations, examination and familiarity with the case of Mr. Cooksey, I think it is quite unlikely that he could have done what Judge Paul asked me from the bench, on the 14th of December, preceding his visit to the hospital. From what we got of his medical history, I thought he was then in a mighty profound state of uremic

toxemia. The questions asked me by the Judge carried me back to the first of November, but as I understand, you are only carrying me back to the 15th of December, about three weeks, I do not think he would be in condition to exercise ordinary business judgment at that time. From the medical side of it, his disease progressed very considerably from early November to December.

Witness stands aside.

Dr. J. R. Boldridge, sworn for plaintiff, testified in chief as follows:

I will be 48 years old in December; received my medical education at the Medical College of Virginia, from which institution I graduated in May, 1909; have been practicing my profession in Culpeper County, Virginia, since that time, doing a general practice. I was acquainted with Mr. Benjamin F. Cooksey, and had been his physician for 14 years and I think I had known him casually before that. I was also the family physician for 14 years. As to the condition of his general health in the early years of my acquaintance with him, up to 1931, would say that he was a very healthy young man. Before the present troubles which are being investigated, I think I treated him in 1918 for "Flu" and I do not recall treating him any more after that until April, 1931, when he appeared to have rheuma- [fol. 77] tism. It was not true rheumatism but was due to absorption of toxic material from his teeth. I advised him to have them taken out, which he did, and he was very much benefitted. I was not a frequent visitor to his home except when I went there on professional business; was very well acquainted with Mrs. Cooksey. As to his treatment of his wife and children before he became afflicted with the disease which resulted in his last illness, so far as I know, he was a very affectionate husband and father, son, husband and father as well, and they lived very agreeably. He was a very hospitable man when anyone went to his house and he tried to make everyone feel at home and make things pleasant for them and he was one of the most inveterate workers I have ever known, he was very good natured, and a very thoughtful man, previous to his sickness. Previous to his last sickness, I was called to his home

on November 15th, 1931, and I assume his Mother or wife, one or the other, phoned for me and I think I went there around 11 o'clock in the day time, but I am not certain. When I got there on the 15th of November, I found him in his bed room, but he was up. When I went in the room he said "hello Doc", that is the way he always addressed me, and he said "what are you doing here", "I am glad to see you, I am not sick enough to have a doctor, they should not have phoned for you, they might have asked me". As to his condition then, he was suffering from a slight cough and general weakness and a run-down condition, and complained of pains from his limbs, back, &c., and generally about over his body, and nervousness. I do not recall his telling me to come back when I left, but as well as I remember, I made this statement to his wife: "If he does not get along all right, let me know and I will come back to see him". I make that statement in a great many instances for the reason that I travel a very large, rough country territory, and I don't want to make a call where it is not necessary, because I have enough to keep me busy where it is necessary. I was back there the next time on the 4th day of December and found his condition about the same as on the first visit. At that time, December 4th, I told him he must get in bed and stay there and made him do it while I was there. The next time I saw him was on the 14th of December, he was an extremely ill man. I was shocked when I walked in and found his face all bloated up and [fol. 78] neck puffed out and his hands. On the day I examined his urine, the 14th, and found that he had a very violent case of Bright's Disease, and I treated him there until the 6th of January. I visited him every other day with the exception of one trip, when I made two days in succession, but with that exception I made a trip there every other day, and I talked to Ben very plainly on various occasions, every time I went there, so far as that is concerned, I told him "Ben, you are a very ill man, I want you to quit worrying because that is one of the worst things that you can do". I further said "you have a conditon that not only affects old people but it affects a lot of young ones too. You have but one thing to do, that is to get well. If you don't get well, your farm and orchard and cattle will not be worth a nickel, and you should try and do everything to try and get well." About ten days

before we carried him—or right around Christmas Day possibly, I began to urge Ben to go to the hospital. I told him "Ben, we are doing all we can for you here, but you are not getting any better; you have got to go up there, or you will get worse. You are a young man and I would hate to see you throw away any opportunities. You have a family and children and it is very necessary for you to get well"; and he said "I am not going". Well, each succeeding visit, almost, the same conversation would be repeated, with the same result "I am not going". On the 6th of January, I went up there and examined him, and I found him just about as he had been—not improving any—if anything, about the same—and I said "Ben, you have got to go to the hospital this evening"—it was about three o'clock in the afternoon—later in the afternoon—I said "You have got to go to the hospital"; and he said "I am not going"; and I said "all right, we will see about it"; and I said "Mrs. Cooksey, go to the other house and phone for some one to come here and take him"; and I said to Mr. Browning, "Bob, put his clothes on and take him to my house—he is going and going this evening; I will not allow him to stay here any longer". I went home and fixed up a little and a short while after that we got in the car——they came down and we got in the car and went to Charlottesville. I don't suppose on the trip—young Williams, I think, drove us up there—I don't think Ben spoke half a dozen times. [fol. 79] It is around sixty-five miles from my house to Charlottesville. He never spoke unless you spoke to him.

As to the difference, if any, between his mental and physical condition on the 14th of December and the 6th of January, when he was carried to the hospital, as I said in the beginning, on the 14th of December he was a desperately ill man, and the condition was practically the same from the start to finish, one day he might look a fraction better and the next day would be back to the same; there was nothing in his general condition or in his urine that would indicate any improvement. As to whether he was capable mentally or physically, of following a gainful employment on the 14th of December, and especially of farming or orcharding, I would state that from the 14th of December on he was never able to get out of bed, much less engage in any occupation. His mental condition was sluggish, he did not have convulsions and was not delirious that I saw, but you could never impress him with the seriousness of the

disease although I talked it over on the 14th and after that, and I do not think he ever appreciated the situation. I would say that on the 14th of December, 1931, he was not capable of attending to any business with any degree of intelligence, of his own volition, he would have to have assistance, in fact, he was never able from my first visit to do anything and that was on the 15th of November, I mean to do his farm work. I understand he did go out between the 15th of November and the 4th of December, but he should not have done so, and I cautioned him against it. So far as I know, he always, up to the 14th of December, took my advice, but this time he did not take it. He did not argue with me when I called attention to his condition but he made several remarks like this "Oh, well, I just as well be dead", or something to that effect, and he would turn it off in a listless way. As to whether he was physically and mentally capable of understanding and following an employment, especially that of agriculture, on the 6th of January, when he was carried to the hospital, I would absolutely say he was not able to do anything on the 6th of January, and his condition then was practically the same, so far as I could tell, as it was on the 14th of December. As to what effect this disease that he was afflicted with would have on the mind, you understand that in Bright's Disease [fol. 80] we have a larger or a certain amount of improvement which varies in different cases, because of the albumen flowing in the blood; together with that, we have an increased amount of urea and these two substances floating in the blood are toxic to the brain and nervous system. It depends on the acuteness of this disease as to just what symptoms you will get. If they come on very gradually, of course you will get gradual symptoms. If it develops suddenly you are liable to blow up with convulsions and things of that type, coma, and all those things. As to the statement in the "Attending Physician's Certificate", of December 4th, I made that certificate out. Julian Brown, the Company's local agent, came to me on the streets of Culpeper, Virginia, with these papers to make out for this company. I says "Julian, I don't remember—I read the questions—I said "I don't remember the dates on this; I will have to consult my records". "Well", he said, "I can tell you the date of your first prescription; I have looked that up at Bruce's Drugstore'; and I said "What was it"; and he said, "the 4th of December". I said "I don't suppose it

makes any material difference", and I went and signed it as from the first prescription, but the first visit I made—I carry some medicine with me and the first visit I made, I furnished my own medicine. That is why that the prescription shows on the 4th of December,—because it was on the second visit that I gave him the prescription, which went to Culpeper, Virginia, and was filled in Bruce's Drugstore; and he looked it up and gave me that, and I didn't think that there would be any question about that matter, and I didn't give it a thought; but that was dated from the prescription, and I dated it on his statement; I didn't even go to the drugstore to look at it myself. As to when I made the discovery that I was there on the 15th of November (I have already explained about the prescription, where I said December 4th was the date I was there, which is not correct) as to why I could not state the exact date, but, after Julian was talking to me I looked it up and I saw that we were wrong, but of course, the papers had gone in then. I didn't know there would be any question about paying the policy. Usually in fixing out a death claim, it is not a question of exactly what date the man was taken sick, or what date I visited him, but the main question that the company [fol. 81] wants to know is, is the man dead and what he died of, and I looked up the records and found that the first visit was November 15th and then Mr. Johnson asked me to make this affidavit, and I did from my records.

On cross-examination witness stated as follows:

As to how long it was after I made the proofs stating that my first visit was December 4th, before I discovered the fact that I was in error, I could not say exactly, I went back and looked it up, I don't know whether it was that day or the next, but it was shortly afterwards, I think, within the next two or three days, but I could not say positively about that, I don't know, it might have been as much as a week. I cannot remember those things. I don't know how long it was before I told Mr. Johnson, I don't know when I talked to Mr. Johnson, I see him once in a while when I go to Culpeper and I probably talked to him several times about it, I could not say.

The affidavit I made for Mr. Johnson is dated April 18th, 1932. I do not think the statement was made out by Mr. Johnson for me in his office, I dictated the statement on

the date of the acknowledgment here and turned it over to Mr. Johnson on the same date. I stated I visited Mr. Cooksey on November 15th, 1931, and that he was suffering from a slight cold and a run-down condition and I gave him some medicine out of my own case, do not recall what medicine I gave him, but some cough preparations and some anodyne tablets for aching &c., there are quite a number of them and I don't know which ones I used. I stated I thought Mr. Cooksey was up in his room when I went there on November 15th and to the best of my recollection he had his clothes on and was sitting up in a chair. I also stated that my next visit was December 4th, and that his condition on December 4th was about the same as November 15th. I don't remember now what I prescribed for him on December 4th, it has been a year and a half; I mean from November to December 4th, it was the same. I will not be certain whether I learned on December 4th that Mr. Cooksey had been out attending to business and had made a trip to Washington when I was there on December 4th, but it is my impression that his wife told me that he had been going out and trying to do, when he was not able to do, and [fol. 82] I told him he must stay in. I diagnosed it at first as Influenza and I still think he had influenza to start with. He was in a run-down condition before he took influenza. He came to see me two or three weeks before I went to see him, at my office, and said "Doc, I am weak and run down and cannot do any work", and then this other attack came on and I went to see him. This is the prescription I wrote on December 4th, it is not for a proprietary medicine, it is a preparation put up by practically all of the chain drug houses, it is a special preparation which was or is a favorite prescription of John Staige Davis for this condition, and that is whom I got it from, for a run-down condition, it is a tonic. As to whether I saw anything wrong with Mr. Cooksey's mental condition on December 4th, will state that during his whole illness, Mr. Cooksey did not appreciate his condition, for instance, as I said before, he was worrying about his outside work, the farming operations, was not going on to suit him. To illustrate that he was worrying all the time from the beginning about his outside work, his farming operations and his cattle and horses, and this and that, and his hands, and he seemed to give very little thought to getting well and taking care of himself, the whole idea was outdoor stuff, which might be a very nat-

ural condition for a man who has been a very active, hard worker like Mr. Cooksey, up until the 14th of December, when he developed this Bright's Disease, but from that on, I explained to him his condition and told him that he had a disease that carried away a good many people, both young and old, and he must not worry, he must take it easy, because worry makes against recovery from Bright's disease, and a great many other diseases, as far as that is concerned. I do not remember the language he used when I was talking to him but he worried about his outside affairs a great deal. I do not know that he went into detail about it at all, but in a way his worrying, is what he told me, and I made the statement a little while ago that he said frequently and he would say "poor devil, I might as well be dead," that was after the 14th, when he was in bed. As to whether I have heard a good many patients when they got sick and had never been sick much before, and never got out or could not get out, make similar statements to that, Yes, I have seen them go shoot themselves, too, and that [fol. 83] is an unusual condition to make a statement like that if he is in good condition mentally and physically. Mr. Cooksey did not send for me, his wife did, and there would have been no reason for sending for me if he was in good condition. As to whether I made the statement contained in the photostatic copy of my statement to the Life Insurance Company of Virginia, I would state that I made that, and I think it has all been explained previously. Yes, I filled out that statement for the Life Insurance Company of Virginia, but I stated I had forgotten when I made it out, I do not know whether it was a day or two or a week or two or a month, I cannot keep all of these little trivial things in my head in a country the size I travel. This statement shows exactly what was explained about the other matter, that it was on the 4th of December, I believe, and that has been explained. I do not think Mr. Brown is the agent for the Life Insurance Company of Virginia, not that I know of.

(Said photostatic copy of the witness' statement to the Life Insurance Company of Virginia is here filed in evidence, and is marked Exhibit 11, and it is agreed that the photostatic copy can be used instead of the original. Said photostatic copy is here certified to the Circuit Court of Appeals.)

I know Mr. Earl Abbott, who is here in Court. I do not remember his calling on me on September 12, 1932, but I remember meeting him in Mr. Burnett Miller's office, but he did not call on me. He asked me several questions, without explaining who he was, or where he came from, or anything of that sort, and I stated to him that Mr. Cooksey was not delirious, was not crazy, did not have convulsions; that he would carry on an ordinary conversation. That is just what passed between us. I do not remember telling him anything about going to the hospital one night to see him at midnight, but I recall the conversation that happened at the hospital. I went to the hospital about midnight, or rather about 11 o'clock, and as a matter of courtesy, while I was there I dropped in and asked the young man there if I could see him and he said "I will admit you for just a minute". I did not want to disturb him but I went in there and he spoke to me and exchanged a few [fol. 84] words, as to what they were, I have forgotten, and I left. I don't know whether he was cheerful or not, the room was darkened, very dark, there was just light enough for a man to see how to walk and the doctor said, as well as I recall, "don't say a great deal to him, he said he did not want to bother him and it is about midnight and you can speak to him and say a word or two and come out"—I spoke to him and asked how he felt or something to that effect, for just a minute and passed on. He knew me and I think he asked me how I was getting on possibly, and what was going on out in the country, I disremember the exact words passed, but he recognized me and talked to me for a moment and I went on. Just what happened and the exact words, he used, I do not remember. I do not know how long Mr. Cooksey had been at the hospital when I made this call, he had been there some days, just how long I do not know. I do not have my record with me of the calls that I made on him.

Witness stands aside.

JAMES F. CANNON, sworn for Plaintiff, testified in chief as follows:

I live in Rappahannock County, Virginia, I knew Mr. Cooksey all of his life. During his last illness I saw him twice, do not remember the dates, but not long before he

went to the hospital. When I was there I do not think he was in very good shape. If you asked him any questions he did not answer them and would talk of something else, the depression and hard times or something like that. I think it was about the first of December when I saw him first, both times I saw him he was in bed. On my first visit I asked him how he felt and he said he did not feel so good and he wanted to know when hard times would end, and of course I could not tell him. On my first visit to him he was not capable of attending to any of the ordinary duties on the farm. As to the condition of his mind, in my opinion he seemed to be wandering. His condition was worse on my second visit which was three weeks later, than it was the first. If you asked him anything maybe he would answer you and sometimes he would not give any answer at all. He was in bed both times and very weak I thought. [fol. 85] My wife went with me and they would not let her go in to see him. Ben and myself were always good friends and they let me go in both times. I am a merchant, Postmaster and a farmer.

On cross-examination, witness stated as follows:

As to whether a man who talks about hard times shows that his mind is wandering, sometimes a man has his mind on one thing and you cannot get him off, and his mind seemed to be set on the depression but it has never bothered me in the last year or two, I try to take things as they come. Some people talk about hard times before they come. Yes, I run a store and do a credit business and some of my customers do talk about hard times, maybe it is a rather popular subject right now, but as to whether that is no indication of anything unusual when a man talks about hard times, you can answer that as well as I can.

In answer to questions by the Court, witness stated as follows:

Mr. Browning was not nursing Mr. Cooksey either times I was there, but he was in bed both times.

In answer to questions by counsel for plaintiff witness stated:

I think Mr. Browning had gone, but I think they said he had been there and they were not able to pay him any more,

but he was not there either time when I was there. I do not know the date he left but it was some time in December.

Witness stands aside.
(Plaintiff rests.)

[fol. 86] By Mr. Abbott: We wish to make a motion in chambers.

In Chambers

(In absence of the jury.)

DEFENDANT'S MOTION FOR DIRECTED VERDICT

By Mr. Martin:

If Your Honor please, we desire to move the Court for a directed verdict: (1) On the ground that the plaintiff has failed to prove that the insured gave due proof to the company that the insured was totally and permanently disabled, as defined by the policy at the time the premium fell due, and was continuously disabled from said due date of said premium in default, to the date of his death; (2) For the reason that the evidence affirmatively shows that the insured was not totally and permanently disabled, as defined by said policy, when the premium in default fell due.

By the Court: I will sustain the motion to strike the evidence, and you gentlemen can make a motion to set aside the verdict.

I am unable to see that there is, or can be, any issue of fact in this case which requires or permits submission to a jury. The evidence of the plaintiff is in substance that under the terms of the policy of insurance a premium thereon was due on November 16, 1931, but that the policy contained a provision allowing 31 days of grace, which would have permitted payment of the premium anytime until December 17th without a lapse of the policy.

The plaintiff became ill in November and his condition became worse, resulting first in confinement to his bed at home and later his removal to the hospital at Charlottesville, the first week in January, 1932, where he later died on January 20, 1932. On January 27, 1932, the defendant company was notified of his death and of the disability preceding his death. There is ample evidence which would

justify a finding that the insured was totally and permanently disabled from and after December 14, 1931, which was before the expiration of the grace period from the pay-
[fol. 87] ment of the insurance premium. But in my opinion, this is not in any way determinative of this case.

This policy provides in Section 12 thereof, "if any premium be not paid before the end of the days of grace, then this policy shall immediately cease and become void and all premiums previously paid shall be forfeited to the company, except as provided in this policy." The premium due November 16, 1931, was never paid and, therefore, under the above provision, the policy became void upon the expiration of the grace period unless there is some other provision of the policy which waived the payment of this premium and continued the policy in force. Section 3 of the policy provides:

Benefits in Event of Total and Permanent Disability Before Age 60

When Benefits become effective:

If, before attaining the age of sixty years and while no premium on this policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continued.

Benefits. (a) Increasing Income.—The Company will pay a monthly income to the Insured of the amount stated on the front page hereof ($10.00 per $1,000.00 fact amount of Policy) beginning upon receipt of due proof of such disability and increasing * * * while total and permanent disability continues.

(b) Waiver of Premiums.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability.

In the consideration by the Court of the demurrer in this case, two cases which came to the attention of the Court, and both of which were argued as applying to the
[fol. 88] provisions of this policy, were those of Bergholm vs. Peoria Life Insurance Company, 284 U. S. 489; and Minn. Mutual Life Insurance Co. vs. Marshall, 29 Fed. (2) 977. It seems to me that these two cases come nearer in

their applicability to the present case than any others which I have found. I confess that it is not so easy for me to draw the distinction which the Supreme Court draws between the meaning of the language of the policies in the two cases mentioned; but where the distinction has been drawn and a meaning attached to the language of those respective policies, I find little difficulty in appreciating the difference in legal effect of the meanings which have been applied to the terms of the policies.

If Section 3 of the present policy be compared with the parallel provision of the policy in the Bergholm case, as quoted in the opinion in that case, it will be found that their meaning and effect is the same, although there is a difference in the language used. In the Bergholm case, it was held that the condition upon which payment of premiums was waived and the forfeiture of the policy thereby prevented was the receipt of proof by the insurance company of total and permanent disability while the policy was still in force and no premiums thereon were in arrears. The effect of the language used in the present case is, in my opinion, the same. In the Marshall case, it was held that the occurrence of the permanent and total disability was the condition upon which payment of premiums were to be waived and that the giving of notice of such disability was an added condition which might be complied with at a later date. In the Bergholm case, it is distinctly held that the condition upon which premiums were to be waived and the forfeiture of the policy thereby prevented was the receipt of notice by the company of the disability and not the disability itself.

In this respect, I cannot read the policy in the present case as having any different effect or meaning from the policy construed in the Bergholm case. It follows, therefore, that even though the insured here became totally and permanently disabled before the expiration of the grace period and while the policy was still in force, that fact alone was not such a condition as to waive payment of the premiums on the policy. No notice or proof of the disability [fol. 89] was given to the company until the death of the insured, which occurred sometime later and some weeks after the grace period for payment of premiums had expired. In other words, the condition upon which the company had agreed to waive payment of premiums was not the disability of the insured, but it was notice to the com-

pany of such disability. Under the provisions of Section 12 of the policy, the policy lapsed for non-payment of premium after December 17, 1931, unless, before that time, notice was received by the company of total and permanent disability of the insured; and it is admitted that no such notice was given or received.

It is contended that the plaintiff having become totally and permanently disabled before the expiration of the grace period, was in no condition to and was unable to give to the company notice of his disability and that he was excused thereby from giving the notice for the reason as contended that it was impossible for him to give it. Even if this contention affected the law of the case, I am by no means sure that the evidence introduced would justify a finding that it was impossible for the insured to have given notice of his disability. It appears that as late as January, while he was in the hospital, he executed certain papers with reference to another insurance policy, having for their purpose the continuing of that policy in force. It is true that he did this at the suggestion and with the aid of friends, but no reason has appeared why the notice to the defendant here could not have been given in the same manner or with the same assistance at a period some weeks earlier. However that may be, I am of opinion that it is not material to the determination of this case.

It is true that there are cases holding that where the insured, or other persons interested in an insurance policy, are unable, through incapacity or through ignorance to furnish notices required by the terms of the policy, the giving of such notice is excused thereby; but I think it will be found that these are all cases where the giving of notice was an added condition of the policy and not the one essential condition upon which rights under the policy depended. In the instant case, the receipt of notice by the company [fol. 90] was the one essential condition upon which the rights of the insured to a waiver of the premiums depended. To say that this notice was not given because the insured was unable to give it, is to say nothing more than that the contingency, or condition, upon which the insurer agreed to waive the premium never occurred. I do not think the provisions set forth on the 4th page of the policy entitled, "Supplementary Benefits, etc." have any application to the facts here. Those provisions of the policy plainly relate to a reinstatement of the policy where it has once lapsed

and where the insured is still living and desires to reinstate the policy.

The same questions discussed here were raised and argued before me on the demurrer filed by the defendant to the notice of motion. At that time, I overruled the demurrer and overruled as well the demurrer to the amended notice. I am now of the opinion that I was in error in overruling the demurrer; but, so far as can be, that may and should be now corrected. I think that a verdict for the defendant should be directed and this will be done.

Plaintiff excepts.

In Court

(In presence of the jury.)

Direction of Verdict

By the Court: Gentlemen of the jury: The Court is of the opinion that there is no issue of fact in this case which is material for its determination, and therefore nothing upon which a jury could properly pass, and in the exercise of my right and responsibility for doing so, I am going to direct a verdict in favor of the defendant company here.

(The jury thereupon brought in a verdict in favor of the defendant, in accordance with the ruling of the Court:)

To which action of the Court in directing a verdict for the defendant, the plaintiff, by counsel, Excepted, and thereupon the plaintiff, by counsel, moves the Court to set [fol. 91] aside the verdict, as contrary to the law and evidence; thereupon the Court overruled the motion to set aside the said verdict, to which action of the Court in overruling the said motion, the plaintiff, by counsel, excepted for reasons heretofore stated.

Certificate of Court

I, John Paul, Judge of the United States District Court for the Western District of Virginia, who presided over the foregoing trial at Lynchburg, do hereby certify that the foregoing is a true and correct narrative stenographic copy

or report of all the testimony that was introduced, and other incidents of the trial therein, all exhibits or other writings introduced in evidence or presented to the trial Court, all questions raised and all rulings thereon, in the case of E. E. Johnson, administrator of Benjamin F. Cooksey, deceased v. The Mutual Life Insurance Company of New York, a corporation, tried in the said Court at Lynchburg, Virginia, on the 16th and 17th of June, 1933, and it appears in writing that the defendant's attorneys have had reasonable notice of the time and place when this report (narrative) of the testimony and other incidents of trial would be tendered and presented to the undersigned for certification, which is certified within due and proper time after final judgment.

Given under my hand this the 28th day of August, 1933.

(Signed) John Paul, Judge.

CERTIFICATE OF CLERK

I, C. E. Gentry, Clerk of the District Court of the United States for the Western District of Virginia, do hereby certify that the foregoing narrative stenographic copy or report of testimony and other incidents of the trial of the cause of E. E. Johnson, Administrator of Benjamin F. [fol. 92] Cooksey, deceased, v. The Mutual Life Insurance Company of New York, a corporation, was filed with me as Clerk of the said Court on the 28th day of August, 1933.

C. E. Gentry, Clerk.

IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD—Filed August 28, 1933

It is hereby stipulated and agreed between counsel for the parties to the above entitled cause, that the record on appeal shall contain the following:

1. The notice of motion for judgment, and the amended notices of motion for judgment.

2. All orders entered in this cause.

3. The demurrers.

4. All pleas.

5. The signed Bills of Exception and Transcript of Record of Proceedings.

6. The Assignments of Error.

7. That the original policy of insurance sued on and marked "Exhibit 1" be certified up with and as a part of the record in this cause; and also the original of the University of Virginia Hospital record of the insured, marked "Exhibit 10"; and also photostatic copy of "statement No. 1 to be made by person claiming the insurance", introduced by defendant and numbered and marked respectively "Exhibit 9, 11 and 15.

[fol. 93] 8. The data required by sub-section 7 of Rule 14 of the United States Circuit Court of Appeals.

9. This stipulation.

10. That the record shall be printed under the supervision of the Clerk of the United States Circuit Court of Appeals under the Rules of said Court pertaining thereto.

Burnett Miller, Counsel for the Appellant. Earl L. Abbott, Counsel for the Appellee.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING COST BOND—Entered September 1st, 1933

Upon consideration of the cost bond, executed by E. E. Johnson and Burnett Miller, in penalty of $250.00, dated August 28th, 1933, it is ordered that the said bond be, and it is, hereby approved, and the deputy clerk of this court at Lynchburg is directed to carefully preserve the same.

[fol. 94] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF CLERK

(As Required by Section 7, Rule 14.)

1. Petition for Appeal, filed August 28, 1933.

2. Order Granting Appeal, dated August 28, 1933, Received and Entered September 2nd, 1933.

3. Copy Order Granting Appeal, lodged in Clerk's Office for adverse parties, September 2nd. 1933.

4. Appeal Bond, in penalty of $250.00, to pay all costs, Approved September 1st, 1933. Obligors: E. E. Johnson and Burnett Miller.

5. Order aproving Bond, dated September 1st, 1933, Received and entered September 2nd, 1933.

6. Citation, dated August 28th, 1933, Legal service accepted, August 28, 1933, by Earl L. Abbott, Counsel for Appellee.

C. E. Gentry, Clerk, by Louis H. Price, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And thereupon it is ordered by the Court here that a transcript of record and proceedings in the cause aforesaid, together with all things, thereunto relating; be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

C. E. Gentry, Clerk, by Louis H. Price, Deputy Clerk.

[fols. 95 & 96] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 97] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3575

E. E. JOHNSON, Administrator of Benjamin F. Cooksey, Deceased, Appellant,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg. At Law

DOCKET ENTRIES

October 19, 1933, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, order approving bond, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of Jno. S. Barbour and Burnett Miller is entered for the appellant.

Same day, the appearance of James C. Martin and Earl L. Abbott is entered for the appellee.

Same day, the original exhibits (documents) are certified up.

November 2, 1933, twenty-five copies of the printed record are filed.

[fol. 98] Argument of Cause

January 25, 1934 (January term, 1934,) cause came on to be heard before Parker and Soper, Circuit Judges, and Baker, District Judge, and is argued by counsel and submitted.

In United States Circuit Court of Appeals, Fourth Circuit

No. 3575

E. E. Johnson, Administrator of Benjamin F. Cooksey, Deceased, Appellant,

versus

The Mutual Life Insurance Company of New York, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg. At Law

(Argued January 25, 1934. Decided April 3, 1934)

Before Parker and Soper, Circuit Judges, and Baker, District Judge.

[fol. 99] John S. Barbour and Burnett Miller (W. F. Moffett on brief) for Appellant, and James C. Martin and Earl L. Abbott (Frederick L. Allen and Martin & Abbott on brief) for Appellee.

OPINION—Filed April 3, 1934

SOPER, Circuit Judge:

This is a suit to recover upon a policy of life insurance in the amount of $4,500 with disability benefits, issued on May 16, 1930, to Benjamin F. Cooksey, the insured, and made payable to his estate. The insured died of acute nephritis, or Bright's disease, on January 20, 1932, and the action was brought by his administrator and removed to the District Court. At the close of the plaintiff's evidence a verdict was directed for the defendant, and plaintiff has taken this appeal.

The ground upon which the case was taken from the jury was that the policy had lapsed on December 17, 1931, at the expiration of a grace period of 31 days, by reason of the failure of the insured to pay the quarterly premium which fell due November 16, 1931. The evidence of the plaintiff tended to show that the disease from which the insured suffered had developed gradually during the fall months, and had reached a stage rendering him totally and permanently disabled by December 14, 1931, when he was put to bed, to remain there until his death. These circumstances, the plaintiff contended, brought into operation a provision of the policy waiving premiums in the event that due proof should be furnished to the company, while no premium was in default, that the insured was totally and permanently disabled. It was urged that the occurrence of the disability was the sole condition required to be satisfied before the expiration of the period of grace, and that proof thereof, which was not in fact furnished during the lifetime of the insured, might properly be furnished within a reasonable time after default. An alternative contention was also made from the time that the disability was established, the mental condition of the insured was such, as a result of uremic poisoning induced by the disease, that he was incapable of furnishing the proof, and therefore the failure to comply with the condition prior to default was excused. [fol. 100] There contentions, which were rejected by the District Court, present the principal questions to be considered.

On the first question, the relevant provisions of the policy are as follows: Upon the face of the policy it was provided that "* * * if the insured is totally and per-

manently disabled before age 60, (the company) will pay to the insured forty-five dollars monthly during such disability increasing after five and ten years' continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3". Section 3 provides:

"If, before attaining the age of sixty years, and while no premium on this policy is in default, the insured shall furnish to the company due proof that he is totally and permanently disabled, * * * the company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues."

"Benefits. (a) * * * The company will pay a monthly income to the insured of the amount stated on the first page hereof * * * beginning upon receipt of due proof of such disability * * *."

"(b) Waiver of Premium. The company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

The plaintiff relied, in the District Court and in this court on appeal, upon the case of Minnesota Life Ins. Co. vs. Marshall, 29 F. (2d) 977; but the pending case is ruled on this point by the decision of the Supreme Court in Bergholm vs. Peoria Life Ins. Co., 284 U. S. 489. In the latter case the policy provisions were substantially similar to those in the case at bar, and the evidence showed a permanent and total disability before the premium became in arrears, and also a failure to furnish proof thereof prior to the insured's death. The court rejected an argument, advanced to show liability under the policy, based on Minnesota Life Ins. Co. vs. Marshall, supra, in these words (pp. 491-2):

[fol. 101] "The pertinent provisions of the policy there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in payment of premiums, 'shall become totally and permanently disabled * * * and shall furnish satisfactory proof thereof, the company will waive the payment of premiums thereafter becoming due', and that 'upon the receipt of due proof of total and permanent disabilities * * * the company will waive the payment of all pre-

miums thereafter becoming due'. The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished."

"We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof*. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy * * *."

The distinction thus pointed out, between the Bergholm and Marshall cases, serves equally to differentiate the latter from the case at bar, for the language of the policy here is equally free from ambiguity, if, indeed, it is not more strongly in favor of the insurer than that in the *Bergholm* case. It is agreed that, "If * * * while no premium on this policy is in default, the insured *shall furnish to the company due proof* that he is totally and permanently disabled * * *" the company will "* * * after receipt of such due proof, waive payment of each premium as it *thereafter* becomes due during such disability". It could not be more plain that the furnishing of proof was intended to be a part of the condition precedent, or that the condi-[fol. 102] tion as a whole was in terms required to be performed before any premium should be in default. The Circuit Court of Appeals for the Eighth Circuit, which decided the Marshall case, has itself distinguished the form of expression there employed from one very similar to that involved in the present case. See Orr vs. Mutual Life Ins. Co. of N. Y., 64 F. (2d) 561. The language of the provision here compels the conclusion that proof of disability must be furnished before default as a condition precedent to the waiver of premiums.

Reference to other provisions of the policy, in aid of the construction for which plaintiff contends, is similarly

without avail. The argument is made that the waiver of premiums is controlled by the broad language on the face of the policy as to disability benefits, (quoted above, immediately before Section 3), which makes no mention of the necessity of furnishing proof, and that the effect of this language is to create an ambiguity, which should be resolved in the insured's favor. But the language referred to is immediately qualified by the clause "all upon the conditions set forth in Section 3", and no one turning to Section 3 could fail to understand that it limits the promise on the face of the policy in several respects.

A further contention, based upon a provision of the policy supplementary to Section 3, above quoted, is also unsound. The provision, which deals with a right of reinstatement, is as follows:

"If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default, due proof is received by the company * * * that the insured was totally and permamently disabled * * * at the date when such premium in default fell due, *and has been continuously so disabled since said due date,* the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred." (Italics inserted.)

The language italicized shows that this provision is inapplicable, when no proof of disability is furnished to the company during the lifetime of the deceased. The right of re-instatement is obviously not intended to survive the [fol. 103] death of the insured. The requirement of proof of disability before default, contained in the disability benefits Section 3, is designed to afford the company an opportunity for investigation during the lifetime of the insured, and thus protect itself against fraudulent claims after death that the insured had become totally and permanently disabled before the default occurred. The requirement is relaxed by the supplementary provision if, during the life of the insured, due proof is received by the company that the insured was disabled when the premium in default fell due, under such circumstances a reasonable opportunity for investigation still exists. A similar result was reached in Brams vs. New York Life Ins. Co., 299 Pa. 11, 148 A. 855.

There remains the question whether the case should have been submitted to the jury with instructions that the insured's failure to furnish proof of disability to the company before default was excused, if the jury should find from the evidence a mental or physical incapacity of the insured, which rendered it impossible for him to make the proof. It is strongly urged by the defendant that such an excuse is ineffectual in view of the clear and unequivocal language of the present policy. It is said that most of the cases which uphold the excuse, where the impossibility of furnishing proofs is shown, are cases involving policies of accident or fire insurance, in which some language may be found in the condition to indicate that the furnishing of proofs is required only when it is reasonably possible to furnish them. Stress is furthermore placed upon the fact that the condition of the policy in the present case is a condition precedent, and that in some of the cited cases, the condition is regarded as subsequent.

It must be conceded that the position of the defendant finds support in cases from two jurisdictions. New England Mutual Life Ins. Co. vs. Reynolds, 217 Ala. 151, 116 So. 151, 59 A. L. R. 1075. Whiteside vs. North American Acc. Ins. Co., 200 N. Y. 320. An overwhelming majority of the state courts that have passed upon the matter have, however, laid down the rule that a condition precedent requiring notice or proof of disability, is excused where its performance is impossible by reason of the physical or mental incapacity of the insured, as where the insured is insane or unconscious during the period when proof [fol. 104] should have been furnished, and that the condition may be performed within a reasonable time after the incapacity is removed. Swann vs. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192. Rhyne vs. Jefferson Standard L. Ins. Co., 196 N. C. 717, 147 S. E. 6; Id., 199 N. C. 419, 154 S. E. 749; Levan vs. Metropolitan Life Ins. Co., 138 S. C. 252, 136 S. E. 304; Roseberry vs. American Benev. Assn., 142 Mo. App. 552, 121 S. W. 785. Continental Casualty Co. vs. Matthis, 150 Ky. 477, 150 S. W. 507; Comstock vs. Fraternal Acc. Assn. of America, 116 Wis. 382, 93 N. W. 22; Reed vs. Loyal Protective Assn., 154 Mich. 161, 117 N. W. 600; Woodmen's Acc. Assn. vs. Byers, 62 Neb. 673, 87 N. W. 546; and see 54 A. L. R. 611, note. The same rule has been applied in two further cases, which seem to place

some reliance upon a view that the particular condition involved was a condition subsequent. Pfeiffer vs. Missouri St. L. Inc. Co., 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; North Am. Acc. Ins. Co. vs. Watson, 6 Ga. App. 193, 64 S. E. 693. Of these cases, the first three, the Swann, Rhyne and Levan cases, and also the Pfeiffer case, involved life insurance policies with provisions for disability benefits similar in all pertinent respect to the provision here. And, although the remaining cases involve accident policies, in none of them does it appear that there was any language in the condition indicative of an intention that proof should be required only where it could reasonably be furnished. Compare: Metropolitan Casualty Ins. Co. vs. Johnston, 247 F. 65.

We think the rule announced by the majority of the state courts is the sound rule to apply. The situation is one where the parties may fairly be said to have contemplated a capacity to make the proof when disability should arise, for otherwise such a contract may prove a trap for the unwary by imposing conditions which incapacity may render it impossible to perform. There is, it is true, no language in the condition which qualifies it in the event that its performance should become impossible; but it is a general rule in the law of contracts, that impossibility may excuse a condition, though a condition precedent, if the existence or occurrence of the condition is no material part of the exchange for the promisor's performance, and the discharge of the promisor will operate as a forfeiture. Restatement of Contracts, Sec. 301; and see Illustrative [fol. 105] Case (4). See also: Williston on Contracts, Vol. 2, Sec. 806. This principle, furthermore, has received recognition by the Supreme Court in Insurance Companies vs. Boykin, 12 Wall. 433, 436, where failure to perform a provision requiring proof of loss in a fire insurance policy was held to be excused by the insanity of the insured, the court saying that "* * * if he was so insane as to be incapable of making an intelligent statement (of the time, nature and amount of the loss), this would of itself excuse that condition of the policy."

The evidence of the plaintiff tended to show mental incapacity to furnish the proof, as well as total and permanent disability prior to December 17, 1931, when the period of grace permitted by the policy expired. Proof

of disability might properly have been furnished at any time before the end of that period, in compliance with the requirement that it be furnished "while no premium on this policy is in default." The defendant, contending that it might not be furnished after November 16, places some reliance on the provision of Section 12 of the policy that, "all premiums are payable on or before their due date * * *". But that language is immediately followed by the grace provision: "A grace of 31 days shall be granted for the payment of each premium after the first, during which days of grace the insurance shall continue in force." No premium could accurately be termed "in default" in view of this provision, until the period had run; for, as pointed out in Minnesota Mutual Life Ins. Co. vs. Marshall, supra, p. 979, in answer to a similar contention: "An obligation is due during the entire period during which it may be paid, whether that period extends over one day, three days, or thirty days. The premium was not really due, in the sense that the failure to pay it would result in a forfeiture of the policy, until the grace period had expired."

The case should have been submitted to the jury with appropriate instructions, since the disease had made such progress by December 14, 1931, that the jury might have found that the insured was incapable on or before that date of complying with the provisions of the policy in regard to notice of disability.

The judgment of the District Court must therefore be reversed.

[fol. 106] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3575

E. E. JOHNSON, Administrator of Benjamin F. Cooksey, Deceased, Appellant,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia

JUDGMENT—Filed and Entered April 4, 1934

This Cause came on to be heard on the transcript of the record from the District Court of the United States

for the Western District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

Morris A. Soper, U. S. Circuit Judge.

April 4, 1934.

[fol. 107] In United States Circuit Court of Appeals

Petition of Appellee for a Rehearing—Presented April 30, 1934

Now, on this day, comes The Mutual Life Insurance Company of New York, a corporation, Appellee in the above case, and files this its petition for a rehearing, and for grounds thereof alleges the following:

1. That the opinion of the Court rendered on the 3rd day of April, 1934, is contrary to the weight of authority as shown by the cases cited in defendant's brief, which this Court overlooked.

2. That the contentions of the defendant find support in seven jurisdictions, as shown in its brief, and not two, as stated in the Court's opinion, which fact the Court has overlooked.

3. That the opinion of this Court is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of Egan vs. New York Life Insurance Co., 67 F. (2d) 899.

4. That, since this case was argued, three additional jurisdictions have rendered decisions favorable to defendant and contrary to the opinion of this Court; that defendant's contentions thereby find support in ten jurisdictions.

5. That the opinion of the Court has imported an ambiguity in the policy not otherwise existing.

6. That the cases cited in the opinion of the Court are all cases holding the condition to be a condition subsequent, or that the policy involved was ambiguous, and therefore excused the insured from giving proof, whether he be sane or insane, which fact the Court has overlooked.

7. That the Court in its opinion fails to distinguish the difference in the contracts between a disability clause in a life insurance policy and a health and accident policy, as other courts have done.

[fol. 108] It was, therefore, conclusively shown and admitted that, the law being conclusively established, there was no issue for the jury and defendant was entitled to a directed verdict. It, therefore, prays that a rehearing of said cause be allowed.

Respectfully submitted, Earl L. Abbott, Counsel for The Mutual Life Insurance Company of New York, a Corporation.

I hereby certify that in my opinion as counsel herein the grounds of the foregoing petition are well founded and I believe the foregoing petition for a rehearing in said cause to be well founded in law, and that the same is proper to be presented and filed.

Earl L. Abbott, Counsel for The Mutual Life Insurance Company of New York, a Corporation. Frederick L. Allen, p. d.; Martin & Abbott, p. d.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered May 2, 1934

[fol. 109] This Court having at its April term, 1934, rendered its decision reversing the judgment of the said District Court appealed from in this cause and the appellee having on April 30, 1934, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered.

It is Now Here Ordered by This Court that the rehearing asked for, be, and the same is hereby, denied at the cost of the appellee. Let mandate issue after 5 days.

John J. Parker, Senior Circuit Judge.

May 2, 1934.

RECITAL AS TO ISSUANCE OF MANDATE, ETC.

On another day, to-wit, May 8, 1934, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Lynchburg, Va., in due form.

Same day, the original petition for appeal, order allowing appeal, bond, and order ap-roving bond are returned to the Clerk of the District Court at Lynchburg, Va.

May 9, 1934, the original exhibits (documents) are returned to the Clerk of the District Court at Lynchburg, Va.

June 21, 1934, certified copy of order of District Court directing the Clerk of that Court to certify to this Court the original policy of insurance, together with original policy of insurance and certificate of the Clerk of the said District Court, are certified up.

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,782. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 154. The Mutual Life Insurance Company of New York, Petitioner, vs. E. E. Johnson, Administrator of Benjamin F. Cooksey, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed July 5, 1934. File No. 154, O. T., 1934.

JUL 5, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES C. MARTIN,
Roanoke, Virginia,
Counsel for Petitioner.

FREDERICK L. ALLEN,
New York City,
MARTIN & ABBOTT,
Roanoke, Virginia,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Supreme Court of the United States:

The petition of The Mutual Life Insurance Company of New York, a corporation, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, respectfully shows to this Honorable Court:

A.

Statement of the Case.

On the 16th day of May, 1930, the petitioner issued to Benjamin F. Cooksey its contract of insurance for $4500.00, which contained the following disability clause, referred to in said contract as Section 3 (R. 87):

> "If, before attaining the age of sixty years and while no premium on this policy is in default, the insured shall furnish to the company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues.
>
> "(b) Waiver of Premium—The company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

The premium due on November 16, 1931, was not paid, and the policy lapsed for non-payment of this premium. On or about December 14, 1931, which was during the grace period, the insured became totally and permanently disabled, and died on January 20, 1932. No proof of the disability suffered by the insured was furnished the Company, as required by the disability clause in the policy, during the lifetime of the insured, and the first notice the company received was proof of death made on January 27, 1932, after the death of the insured (R. 33). The Company refused payment of the policy because the same had lapsed for non-payment of the November 16, 1931, premium, and respondent brought this suit (R. 1). Upon a trial of the case the Judge of the District Court directed a verdict in favor of petitioner (R. 27) and respondent secured a reversal in the Circuit Court of Appeals for the Fourth Circuit at Richmond, upon the sole ground that the insured's

mental or physical disability, which rendered it impossible for the insured to make proof under the disability clause of the policy, excused him from furnishing such proof before default in payment of the premium (R. 98).

B.

The Question Presented.

The sole question presented in this case is whether insanity of the insured excused the failure to comply with an explicitly stipulated requirement of his life insurance policy to the effect that due proof of disability was a condition precedent to the waiver by the insurance company of the payment of premiums due on said policy.

C.

Rulings of the Court Below.

The District Court directed a verdict for the petitioner on the ground that under the decision in the case of *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 Sup. Ct. 230, receipt by the Company of due proof of disability was definitely made a condition precedent to an assumption by it of the payment of the premiums becoming due after the receipt of such proof and that where no such proof was furnished the policy lapsed for non-payment of the premium (R. 86).

The Circuit Court of Appeals admitted that the receipt by the Company of due proof of disability was definitely made a condition precedent to the waiver of the premiums becoming due after the receipt of such proof, but held that it was a question for the jury whether insured's alleged insanity made it impossible for him to furnish such proof and if they so found, the furnishing of such proof was waived.

D.

Reasons for Granting the Petition.

(1) The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit on the same question in *Egan* v. *New York Life Insurance Company,* 67 Fed. 2d, 899. The question involved in the *Egan* case is the same question that is involved in the case at bar; and the holding in that case is directly contrary to the holding here complained of. In that case the action was to recover five annual disability payments of $1,000 apiece alleged to be due under a life insurance policy, brought by the committee of an insane insured, claim having first been made after the policy had lapsed for non-payment of premiums. The committee contended that the insanity of the insured which antedated the lapse of the policy rendered inoperative the policy provision requiring the furnishing of prompt proof of disability as a condition precedent to the waiver of premiums by the Company and excused the legal consequences of failure to perform this condition precedent. The Circuit Court of Appeals for the Fifth Circuit, however, decided that that contention was untenable, saying that under the *Bergholm* case the provision of the policy requiring prompt proof of disability is not to be considered waived or rendered inoperative simply because of misfortune overtaking the insured, but that the contract clearly contemplated that if for any reason the insured was unable to promptly make proof of his disability, some one else in interest must do so for him.

(2) The Circuit Court of Appeals below has disregarded contrary applicable decisions of this Court.

The Circuit Court of Appeals below has rested its holding on the proposition that impossibility of performance may excuse the performance of a condition precedent if

the existence of such condition *"is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."* (Italics ours.) The holding that the furnishing of due proof of disability as provided in the policy here involved is no material part of the exchange for the performance of the promisor, to wit, the waiver of premiums, contravenes the time-honored holding of this Court that the condition in a policy of life insurance that the policy shall cease, if the stipulated premium shall not be paid on or before the day fixed for payment is of the very essence and substance of the contract against which even a Court of Equity cannot grant relief. *New York Life* v. *Statham, et al.,* 93 U. S. 24; *Klein* v. *Ins. Co.,* 104 U. S. 88; *Bergholm* v. *Peoria Life,* 284 U. S. 489.

The holding of the Circuit Court of Appeals here complained of, that "a mental or physical incapacity of the insured which rendered it impossible for him to make the proof" of disability, excused the legal consequence of failure to comply with (as stated in the opinion in the *Bergholm* case) "an explicitly stipulated requirement of the policy" which constituted a condition precedent to the waiver of the premium, ignores the established holding of this Court that, with respect to payment of insurance premiums, the doctrine that accident, inevitable necessity or the Act of God may excuse performance, has no existence. *New York Life* v. *Statham, supra; Klein* v. *Ins. Co., supra; Bergholm* v. *Peoria Life, supra.*

(3) The question involved herein is of sufficient general importance to warrant the consideration of this Honorable Court. The question involved is important as it affects the rights and interests of numerous holders of life insurance policies, not only of policies issued by the petitioner but of policies issued by other life insurance companies as well.

Where, heretofore, the petition for writ of certiorari to this Court in insurance cases showed that proper grounds existed, the writ has usually been granted. See *Bergholm* v. *Peoria Life*, 284 U. S. 489; and *Landress* v. *Phoenix Mutual Life Ins. Co. et al.*, No. 295, October Term, 1933.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fourth Circuit, at Richmond, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3575, E. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, Appellant, v. The Mutual Life Insurance Company of New York, Appellee, and that the said judgment of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
By JAMES C. MARTIN,
Roanoke, Virginia,
Counsel for Petitioner.

FREDERICK L. ALLEN,
New York City,
MARTIN & ABBOTT,
Roanoke, Virginia,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit in this case is reported in E. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, vs. The Mutual Life Insurance Company of New York, 70 F. (2d) 41 (R. 98).

II.

Jurisdiction.

(1) The date of the judgment to be reviewed is April 4, 1934 (R. 106). The petitioner filed motion for rehearing in the Circuit Court of Appeals (R. 107) and same was denied by the said court May 2, 1934 (R. 108).

(2) The jurisdiction of this Honorable Court is invoked under Sec. 347a of the Judicial Code, and Supreme Court Rule 38(5b).

(3) Cases believed to sustain the jurisdiction of this Court are the following:

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230;

Egan v. *New York Life Ins. Co.*, 67 F. (2d) 899;

New York Life Ins. Co. v. *Alexander*, 122 Miss. 813, 85 So. 93;

New England Mutual Life Ins. Co. v. *Reynolds*, 217 Ala. 307, 116 So. 151;

Hall v. *Acacia Mut. Life Ass'n* (Tenn. 1932) 46 S. W. (2d) 56;

Northwestern Mutual Life Ins. Co. v. *Dean*, 43 Ga. App. 67, 157 S. E. 878;

Smith v. *Missouri State Life Ins. Co.*, 134 Kan. 426, 7 P. (2d) 65;

Courson v. *New York Life Ins. Co.*, 295 Pa. 518, 145 A. 530;

Reynolds v. *Traveler's Ins. Co.* (Wash. 1934) 28 P. (2d) 310;

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va. 1933) 171 S. E. 748.

III.

Statement of the Case.

This has already been stated in the preceding petition under A (p. 2 *et seq.*), which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

The undisputed evidence shows that the insured did not become totally and permanently disabled within the intent and meaning of policy until after default in the payment of the premium due November 16, 1931, and that the insured did not become disabled until after December 14, 1931, which was during the days of grace, if then, as he was able to execute an extension note with reference to another policy on January 8, 1932 (R. 44). The Circuit Court of Appeals erred in reversing the judgment of the trial court and in holding that the insured was excused from furnishing proof of his disability under the disability clause of the policy, if prior to default in payment of the premiums, he was mentally or physically incapable of furnishing the proof, instead of holding that the furnishing of proof of the disability was a condition precedent to waiver of premium, whether the insured be mentally capable or incapable.

V.

ARGUMENT.

The only legal question involved is whether or not mental incapacity or insanity of the insured to entitle him to waiver of premiums in the disability clause in question excuses him from furnishing due proof of his disability to the company before default in payment of the premiums.

The Circuit Court of Appeals below held that if the insured be sane, the furnishing of due proof is a condition precedent, but if he be insane or mentally incapacitated, then he is allowed a reasonable time thereafter to furnish proof —hence a condition subsequent. The petitioner asserts that the disability clause in question is not open to this construction—that the condition with reference to furnishing proof must be a condition precedent or subsequent, regardless of the mental capacity of the insured; that in this case it is a condition precedent, even though the insured be insane or mentally unable to personally furnish the required proof, and the company is not bound to waive the premiums thereunder until the required proof is received.

In *Bergholm* v. *Peoria Life Insurance Co.*, 284 U. S. 489, 492, 52 S. Ct. 230, 231, this Court held in a similar policy that the disability clause was free from ambiguity; that the construction of the disability clause was reasonable and just; and added:

> "but it furnished no warrant for avoiding hard consequences by imparting into a contract an ambiguity which otherwise would not exist, or under the guise of construction, by forcing from plain words unusual and unnatural meanings."

The Circuit Court below did this, contrary to the decision of this Court. This Court further held in the same case that:

> "to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief, by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles."

The court below utterly disregarded the terms of the contract, and imparted into the contract an ambiguity which otherwise does not exist, and "under the guise of construction" has forced from "plain words" unusual and unnatural meanings.

The decision below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Egan* v. *New York Life Ins. Co.*, 67 F. (2d) 899. The policy in that case is identical with the one now before the Court, and in construing the policy the Court for the Fifth Circuit held that:

> "Insanity and consequent inability of the insured to personally furnish proof of his disability did not excuse him, since the furnishing of proof was made a condition precedent to waiver of premiums by the terms of the policy, the terms of which are plain and unambiguous."

The court below failed to follow the rulings of the Supreme Court applicable to the same situation, namely, that which respects the prompt payment of premiums. The rule is laid down clearly in the cases of *New York Life Ins. Co.* v. *Stratham*, 93 U. S. 24, 23, L. Ed. 789; *Klein* v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230. The *Stratham* case held that time of payment of premiums is material and of the essence of the contract. "Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here." The *Klein* case held that insanity did not excuse the payment of premiums when due. In the *Bergholm* case this Court held that the provision in the policy respecting the giving of notice of disability, in order to have payment of the premium waived, had to be strictly complied with, and was governed by the same principle that governs the payment of premiums as they become due.

As insanity does not excuse the payment of premiums when due (*Klein* v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662), it should not excuse the furnishing of due proof for waiver of premiums in event of disability. *Reynolds* v. *Traveler's Ins. Co.* (Wash.), 28 P. (2d) 310; *Iannarelli* v. *Kansas City Life Ins. Co.* (W. Va.), 171 S. E. 748; *New England Mut. Life Ins. Co.* v. *Reynolds*, 217 Ala. 307, 116 So. 151.

The decision of the court below is contrary to and in conflict with the weight of authorities as shown by the following:

New England Mutual Life Ins. Co. v. *Reynolds*, 217 Ala. 307, 116 So. 151;

New York Life Ins. Co. v. *Alexander*, 122 Miss. 813, 85 So. 93;

Northwestern Life Ins. Co. v. *Dean*, 43 Ga. App. 67, 157 S. E. 878;

Berry v. *Lamar Life Ins. Co.* (Miss.), 142 So. 445;

Hall v. *Acacia Mut. Life Ass'n* (Tenn.), 46 S. W. (2d) 56;

Wolfe v. *Mutual Life Ins. Co.*, 3 Tenn. App. 199;

Smith v. *Missouri State Life Ins. Co.*, 134 Kan. 426, 7 P. (2d) 65;

Courson v. *New York Life Ins. Co.*, 295 Pa. 518, 145 Atl. 530;

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va.), 171 S. E. 748;

Bloss v. *Equitable Life Assur. Soc. of U. S.* (Wash.), 28 P. (2d) 303;

Reynolds v. *Traveler's Ins. Co.* (Wash.), 28 P. (2d) 310.

The decisions referred to disclose that the modern forms of life insurance usually contain the disability clause in question. That its construction is of great importance

and of public interest is obvious. Therefore it is respectfully submitted that, because there are two lines of decisions on the question of construction of the clause, there should be a uniform rule of construction among the Federal courts upon a question of such vital importance to the welfare of the public, and this Honorable Court should require this case certified to it for review. Sec. 347a, Judicial Code; Rule 38(5b), Supreme Court Rules; *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

All the cases cited are in point with the position of the petitioner asserted in the petition and this brief, and they hold that the furnishing of proof of disability under a disability clause, similar to the one in this case, is a condition precedent to waiver of premiums, and such proof is not excused by the insanity or mental incapacity of the insured.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the judgment of the Circuit Court of Appeals for the Fourth Circuit may be reviewed, and that for such purpose Petitioner prays that writ of certiorari issue to said court and on final hearing the judgment of said court be reversed and the judgment of the trial court affirmed.

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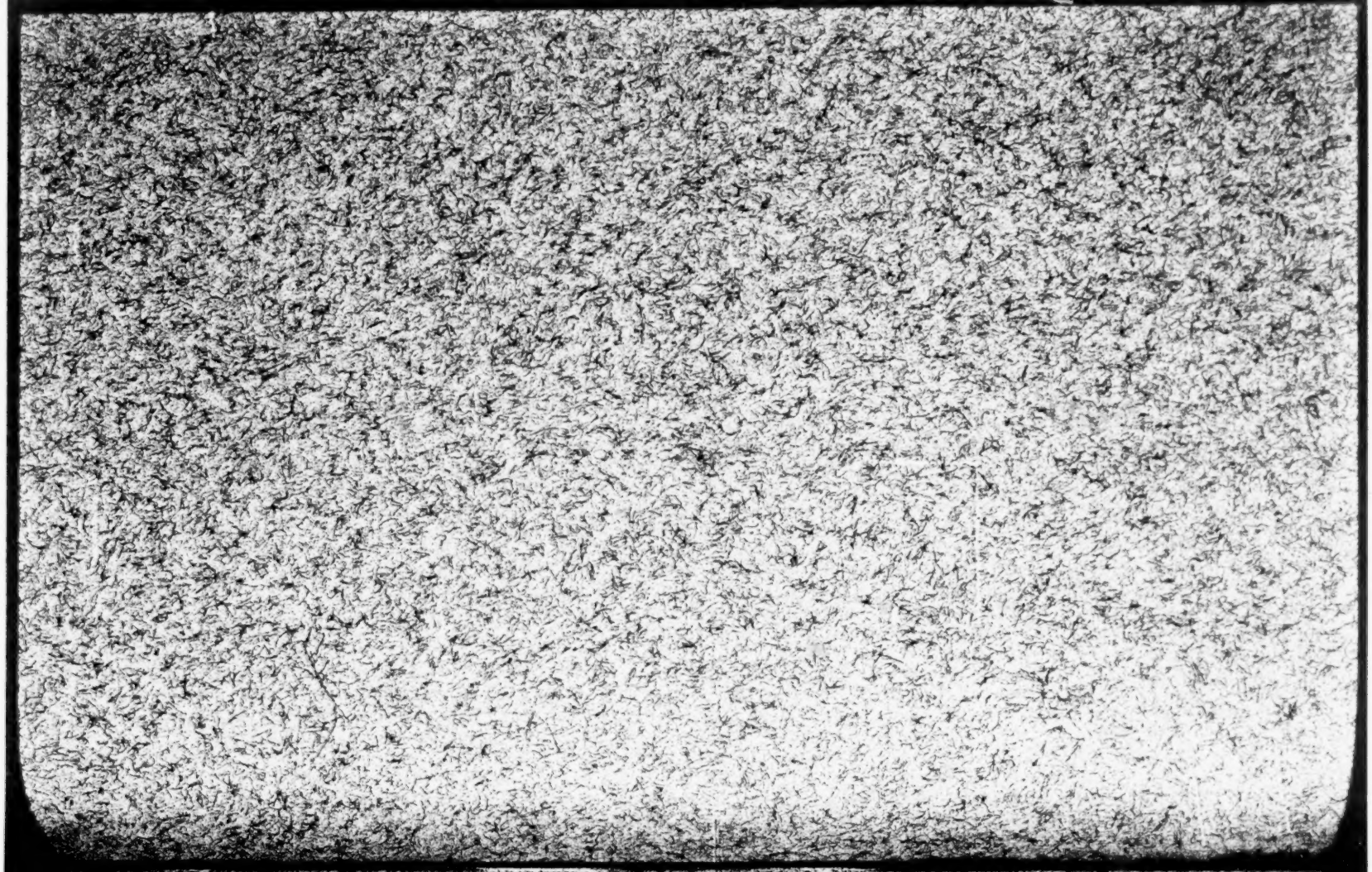

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CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED,

Respondent.

BRIEF FOR PETITIONER

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Respondent.

BRIEF FOR PETITIONER

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The opinion of the lower court is reported in 70 F (2d) 41 (R-98).

I.

JURISDICTION.

(1) The date of the judgment to be reviewed is April 4, 1934 (R-106).

(2) The jurisdiction of this Court is invoked under Sec. 347a of the Judicial Code, and Supreme Court Rule 38 (5b).

(3) The case of *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230; and *Egan v. New York Life Ins. Co.*, 67 F (2d) 899, are believed to sustain the jurisdiction of this Court.

II.

STATEMENT OF THE CASE.

On the 16th day of May, 1930, the petitioner issued its contract of insurance to Benjamin F. Cooksey for Forty-Five Hundred and 00/100 ($4500.00) Dollars. All premiums due in connection with said policy, up to and including the one due August 16, 1931, were paid, the premiums being payable quarterly. The contract of insurance contained the usual provisions of an ordinary life policy and also provisions for double indemnity for death by accident and total and permanent disability benefits. The original policy, which is not copied in the record, but under stipulation 7 (R-92) is certified as a part of the record.

This policy provides in Section 12 thereof (R-87):

> "If any premium be not paid before the end of the days of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company, except as provided in this policy."

The premium due on November 16, 1931, was never paid, and the policy, under the above provision, became void upon the expiration of the grace period.

Section 3 of the policy provides as follows (R-87):

"BENEFITS IN EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60.

"When Benefits Become Effective:

"If, before attaining the age of sixty years and while no premium on this policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

"Benefits (a) Increasing Income—The Company will pay a monthly income to the Insured of the amount stated on the front page hereof ($10.00 per $1,000.00 face amount of Policy) beginning upon receipt of due proof of such disability and increasing * * * * while total and permanent disability continues.

"(b) Waiver of Premiums—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

On or about December 14, 1931, which was during the grace period, the insured became totally and permanently disabled, and died on January 20, 1932. No proof of the disability suffered by the insured was furnished the Company, as required by the disability clause in the policy during the lifetime of the insured, and the first notice the Company received was proof of death made on January 27, 1932, after the death of the insured (R-33). The Company refused payment of the policy because the same had lapsed for non-payment of the November 16, 1931, premium, and respondent brought this suit (R-1). Upon a trial of the case the Judge of the District Court directed a verdict in favor of the petitioner (R-27-87) and respondent secured a reversal in the Circuit Court of Ap-

peals for the Fourth Circuit (R-98) upon the sole ground that the insured's mental or physical disability, which rendered it impossible for the insured to make proof under the disability clause of the policy, excused him from furnishing such proof before default in payment of the premium.

III.

Specification of Error.

The Circuit Court of Appeals for the Fourth Circuit erred in reversing the judgment of the District Court and in holding that the insured was excused from furnishing proof of his disability under the disability clause of the policy, if prior to default in payment of the premium he was mentally or physically incapable of furnishing the proof, instead of holding that the furnishing of proof of disability was a condition precedent to waiver of the premium, whether the insured be mentally capable or incapable.

IV.

Argument.

The sole question presented in this case is whether the mental or physical incapacity of the insured excused the failure to comply with an explicitly stipulated requirement of his life insurance policy to the effect that due proof of disability was a condition precedent to the waiver by the insurance company of the payment of premiums due on said policy.

The Circuit Court of Appeals for the Fourth Circuit in its decision of this case held that if the insured be sane, the furnishing of due proof is a condition precedent to the

waiver of premiums, but if he be insane or mentally incapacitated, then he is allowed a reasonable time thereafter to furnish proof—therefore a condition subsequent. The petitioner asserts that the disability clause under this policy in question is not open to this interpretation—that the condition relative to furnishing proof, regardless of the mental capacity of the insured, must be either a condition precedent or a condition subsequent. It cannot be both, since the policy is not ambiguous and not open to such construction. Under a proper construction of this policy, whether the insured be sane or insane, the Company is not bound to waive payment of premiums thereunder until the required proof of the disability is made in conformity to the provisions of said policy.

To entitle the insured to the disability benefits provided for by the policy, consisting of the waiver of premiums, the Company must *receive due proof that the insured has become totally and permanently disabled* within the intent and meaning of the policy.

The language of the policy makes receipt by the Company of proof of the disability a *condition precedent* to the waiver of payment of such premium as it *thereafter* becomes due during insured's said disability.

Peoria Life Ins. Co. v. *Bergholm,* 50 F (2d) 67 (Fifth Circuit Court of Appeals), affirmed in

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Egan v. *New York Life Ins. Co.,* 67 F. (2d) 899 (Fifth Circuit Court of Appeals).

Smith v. *Missouri State Life Ins. Co.,* 134 Kan. 426; 7 P. (2d) 65.

Northwestern Mut. Life Ins. Co. v. *Dean,* 43 Ga. App. 67; 157 S. E. 878, Affirmed in *Dean* v. *Northwestern Mut. Life Ins. Co.* 175 Ga. 321, 165 S. E. 235.

New England Mut. Life Ins. Co. v. *Reynolds,* 217 Ala. 307, 116 So. 151.

New York Life Ins. Co. v. *Alexander,* 122 Miss. 813, 85 So. 93, Affirmed in *Berry* v. *Lamar Life Ins. Co.* (Miss. 1932) 142 So. 445.

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Western and Southern Life Ins. Co. v. *Smith.* 41 Ohio App. 197, 180 N. E. 749.

Courson v. *New York Life Ins. Co.,* 295 Pa. 518; 145 Atl. 530.

Iannaralli v. *Kansas City Life Ins. Co.* (W. Va.) 171 S. E. 748.

Reynolds v. *Traveler's Ins. Co.* (Wash.) 28 P. (2d) 310.

The provision of the policy in this case, making receipt by the Company of proof of disability a condition precedent to waiver of premiums, is free from ambiguity.

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense.

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

The condition in a policy of life insurance that the policy shall cease, if the stipulated premium is not paid on or before the day fixed, is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. The same is true of a condition of a policy making the furnishing of proofs a condition precedent to the right to disability benefits.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

Klein v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham*, 93 U. S. 24, 23 L. Ed. 789.

To discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract, in utter disregard of long-settled principles.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

Insanity does not excuse the payment of premiums when due.

Klein v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham*, 93 U. S. 24, 23 L. Ed. 789.

If insanity does not excuse the payment of premiums when due, it should not excuse the furnishing of due proof to waiver of premiums in the event of disability.

New England Mut. Life Ins. Co. v. *Reynolds*, 217 Ala. 307, 116 So. 151.

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va.) 171 S. E. 748.

Reynolds v. *Traveler's Ins. Co.* (Wash.) 28 P. (2d) 310.

Smith v. *Missouri State Life Ins. Co.*, 134 Kan. 426, 7 P. (2d) 65.

The fact that the insured was insane and therefore did not furnish proofs of disability, did not relieve the insured, or someone for him, from the duty of fulfilling the

condition precedent, namely, the furnishing of proof of disability, in order to obtain waiver of premiums falling due after receipt of such proofs.

Egan v. *New York Life Ins. Co.*, 67 F (2d) 899.

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va.) 171 S. E. 748.

The Circuit Court of Appeals below has rested its holdings on the proposition that impossibility of performance may excuse the performance of a condition precedent if the existence of such condition *"is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."* (Italics ours.) The holding that the furnishing of due proof of disability, as provided in the policy here involved, is no material part of the exchange for the performance of the promisor, to-wit, the waiver of premiums, contravenes the time-honored holding of this court that the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed for payment is of the very essence and substance of a contract against which even a court of equity cannot grant relief.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230.

Klein v. *New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham*, 93 U. S. 24, 23 L. Ed. 789.

The holding of the Circuit Court of Appeals here complained of, that "a mental or physical incapacity of the insured which rendered it impossible for him to make the proof" of disability, excused the legal consequence of failure to comply with (as stated in the opinion in the *Bergholm* case) "an explicitly stipulated requirement of

the policy" which constitutes a condition precedent to the waiver of the premium, ignores the established holding of this Court that, with respect to payment of insurance premiums, the doctrine that accident, inevitable necessity, or Act of God may excuse performance, has no existence.

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Klein v. *New York Life Ins. Co.,* 104 U. S. 88, 26 L. Ed. 662.

New York Life Ins. Co. v. *Statham,* 93 U. S. 24, 23 L. Ed. 789.

Section 3 of the policy provides under what conditions the premium payments will be waived and benefits paid to the insured. When the conditions under this section have been fully complied with by the insured, then the Company agrees to waive payment of the premiums.

Giving the words contained in the policy their natural and ordinary meaning, as this Court did in the *Bergholm* case, it is clear that there is no ambiguity. The Circuit Court of Appeals below recognized this when it said:

> "The distinction thus pointed out, between the *Bergholm* and *Marshall* cases (Minnesota Life Ins. Co. v. Marshall, 29 F. (2d) (977) serves equally to differentiate the latter from the case at bar, for the language of the policy here is equally free from ambiguity, if indeed it is not more strongly in favor of the insurer than that in the *Bergholm* case. It is agreed that 'If * * * while no premium on this policy is in default, the insured *shall furnish to the Company due proof* that he is totally and permanently disabled * * * ' the company will ' * * * after receipt of such due proof, waive payment of each premium as it *thereafter* becomes due during such disability.' It could not be more plain that the furnishing of proof was intended to be a part of the condition precedent,

> or that the condition as a whole was in terms required to be performed before any premium should be in default. * * * The language of the provision here compels the conclusion that proof of disability must be furnished before default as a condition precedent to the waiver of premiums." (R-98, 101.)

The natural meaning of the language in this policy is that if the *insured will furnish due proof to the Company that he is totally and permanently disabled, the Company will, after receipt of such proof, waive each premium thereafter becoming due.* The condition is not "if the insured becomes disabled" but is "if the Company receives due proof" of the disability.

The policy of insurance in the *Bergholm* case and the instant one are practically identical, both providing for waiver of premiums upon receipt of proof of total and permanent disability while the policy is in force and all premiums due prior to the time of making proof paid.

Mr. Justice Sutherland, who delivered the opinion of the Court said:

> " * * * the obligation of the Company does not rest upon the existence of the disability; but it is the receipt by the Company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premium *becoming due after receipt of such proof.* The provision to that effect is wholly free from * * * * ambiguity."

And continuing:

> "This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by imparting into a con-

> tract an ambiguity which otherwise would not exist, or under the guise of construction, by forcing from plain words unusual and unnatural meanings."

And again:

> "And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a *condition precedent* to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles."

In the face of this decision it is hard to realize that the Court of Appeals below did "force from plain words unusual and unnatural meanings" and "imparted into the contract an ambiguity" which otherwise did not exist, by holding that the insured was excused from furnishing due proof to the Company of his disability, if he was mentally or physically incapable. And we contend that under the decision of the *Bergholm* case, this policy is not open to such construction, regardless of the mental capacity of the insured to furnish proof. Moreover the premiums to be waived are those becoming due *thereafter,* "commencing with the first premium due after approval of said due proof."

The identical policy now before this Court was construed in the same manner in the case of *Orr* v. *Mutual Life Ins. Co. of New York* (C. C. A. 8th) 64 F (2d) 561, citing with approval the *Bergholm* case.

In *Egan* v. *New York Life Ins. Co.* (C. C. A. 5th) 67 F (2d) 899, the insured was *insane,* and therefore mentally incapable of furnishing the proof. The policy was identical with the one at bar so far as the disability pro-

visions are concerned. In holding that insanity did not excuse the furnishing of proof, the Court said:

> "It is contended * * * that, since Egan was insane and unable to personally furnish proof of his disability, that condition of the policy was inoperative and waived. * * * * This contention is untenable. The policy is plain and unambiguous. The contract clearly contemplates that, if for any reason the insured is unable to promptly make proof of his disability, warranting the suspension of premiums and the payment of the annual installments, someone else in interest must do so for him. *This is a condition precedent necessary to be complied with to fix liability under the policy.* It is very material to the risk that proof of total disability be furnished promptly and while the policy is kept in force by payment of premiums. *The provisions of the policy so requiring are not to be considered waived or rendered inoperative simply because of misfortune overtaking the insured. Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416." (Italics ours.)

The decision of this case by the Court of Appeals below is in direct conflict with that of the Egan case, and with the following cases:

Iannarelli v. *Kansas City Life Ins. Co.* (W. Va. 1933) 171 S. E. 748, is a similar case. The insured became *insane* before the second premium became due and payable, and while so incapacitated the grace period expired and the policy lapsed. It was the contention of the insured's committee that inasmuch as the insured could not furnish the proof because of his disability, that under such circumstances proof could be furnished within a reasonable time thereafter; that the furnishing of such proof was a condition subsequent.

In answer the West Virginia Court said:

> "We are of opinion that, under the plain language of the policy in suit, proof of the disability was required to be furnished before the policy lapsed. This view is sustained by the holdings of many courts * * *. But we do think that the line of reasoning followed in the cases of this group is basically sound" (citing many cases, including *Bergholm* case).

In concurring in the opinion, Kenna, Judge, said:

> "By the terms of the policy, when a premium is due it must be paid or the policy contract lapses. This must be done * * * within the time specified. Then the disability clause contracts to waive payment of premiums under certain conditions. * * * Obviously, they must be paid or waived when due, else the policy is not kept alive. The company surely cannot be expected to keep the policy in effect unless the premium is paid or it is notified of disability so that it can waive the payment when the premium is due. When neither occurs at the time the premium is payable the policy lapses * * * . *The premium cannot be waived after it has become due and has defaulted. That would be to waive the effect of non-payment of premiums, whereas the provision is to waive payment.*" (Italics ours.)

Had there been no total disability clause in this policy, the non-payment of the November 16, 1931, premium would have terminated the rights of the insured under the policy.

In *Klein* v. *New York Life Ins. Co.,* 104 U. S. 88, 26 L. Ed. 662, this Court held that insanity or incapacitating sickness of the insured would not excuse payment of premiums when due. What effect, then, does the insertion

of the total disability clause have? In the *Iannarelli* case, supra, the Court said:

> "Its only purpose is to relieve the insured of the burden of paying premiums while he is under disability and not to place a monetary liability on the insurer * * * * For an additional premium the insured thereby undertook a definite thing, and it only. The undertaking is that upon *receipt of proof by the Company * * * and before default in payment of any subsequent premiums, and while the policy is in force * * * * he has become totally and permanently disabled, the Company will waive the payment of any subsequent premiums which mature during the continuance of the disability.*" (Italics ours.)

To the same effect is *Reynolds* v. *Traveler's Ins. Co.* (Wash. 1934) 28 P. (2d) 310, where the insured was likewise insane or mentally incapacitated to furnish proof. Very appropriately the Court said:

> "Now, if insanity does not excuse the failure to pay premiums, then there can be no good reason why it should excuse the failure to furnish proof of disability. It is proof of disability that excuses the failure to pay premiums. * * * Such disability includes insanity and other forms of mental incompetency. * * * We therefore must hold that the *incapacity of the insured furnishes no excuse for the failure to make due proof during the time that the policy was kept in force by payment of premiums.*" (Italics ours.)

Smith v. *Missouri State Life Ins. Co.,* 134 Kan. 426, 7 P. (2d) 65, is a similar case like that in the case at bar. Holding that insanity did not excuse the furnishing of proof, the Court said:

"Touching the contention that insanity should excuse the furnishing of proof, it will be noted that the law is well settled beyond any question that insanity does not excuse the payment of premium, and if it does not excuse the payment of premium, there is no good reason why it should excuse the failure to furnish proof of disability. On its face the rule may seem harsh, *but an examination into the basic principles of the insurance contract is convincing that it is sound, and reasonable.*" (Italics ours.)

There are many other cases to the same effect, all similar to the case at bar, and all holding that insanity does not excuse the failure to furnish proof of the disability. They are cited for the sake of brevity as follows:

Berry v. *Lamar Life Ins. Co.* (Miss.) 142 So. 445.

Bloss v. *Equitable Life Assur. Soc. of U. S.* (Wash.) 28 P. (2d) 303.

Courson v. *New York Life Ins. Co.,* 295 Pa. 518, 145 Atl. 530.

Hall v. *Acacia Mut. Life Ass'n.* (Tenn.) 46 S. W. (2d) 56.

New York Life Ins. Co. v. *Alexander,* 122 Miss. 813, 85 So. 93.

Dean v. *Northwestern Mut. Life Ins. Co.,* 43 Ga. App. 67, 157 S. E. 878, Affirmed in

Dean v. *Northwestern Mut. Life Ins. Co.,* 175 Ga. 321, 165 S. E. 235.

Yohalem v. *Columbian National Life Ins. Co.,* 244 N. Y. S. 666.

Yet the Court of Appeals below (R-98-103) said:

"It must be conceded that the position of the defendant *finds support in cases from two jurisdictions.*" (Italics ours.)

CONCLUSION.

The Circuit Court of Appeals for the Fourth Circuit erred in reversing the District Court by holding that insanity or mental or physical incapacity of the insured excused him from furnishing due proof of his total and permanent disability to the Company, in order to entitle him to waiver of premiums under the disability clause of the policy. Under the decision of this Court in the *Bergholm* case and the other cases cited by petitioner in this brief, we respectfully contend that the judgment of the Circuit Court of Appeals in this case should be reversed and judgment of the District Court affirmed.

Respectfully submitted,

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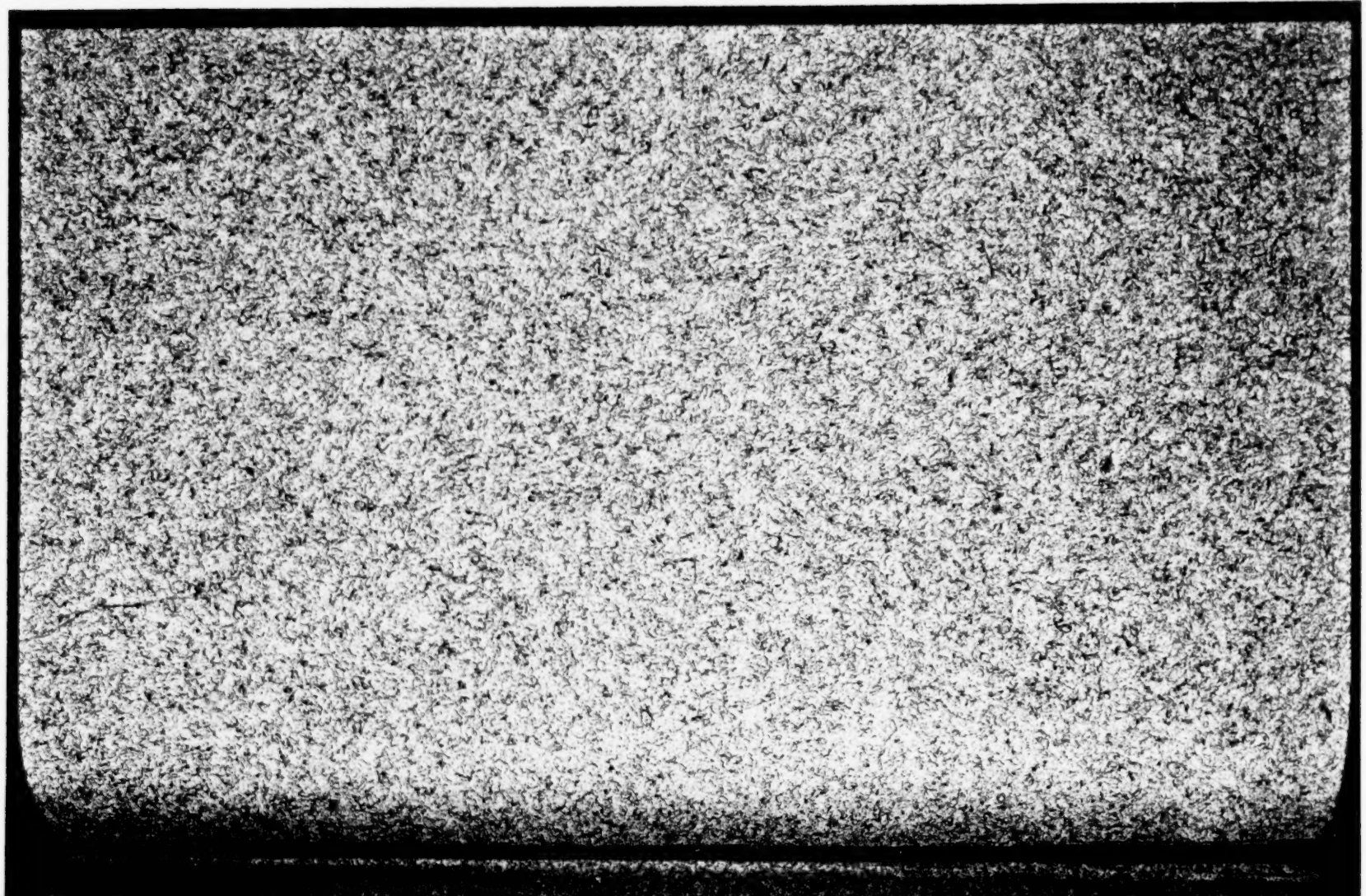

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED,

Respondent.

REPLY BRIEF FOR PETITIONER

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E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED,

Respondent.

REPLY BRIEF FOR PETITIONER

In the brief of the respondent it is contended that physical disability fixed liability for previous waiver; that the occurrence of the disability and not the furnishing of proof fixed the liability of the company. This contention, in the face of *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489, 52 S. Ct. 230, is unsound and untenable. It is impossible to read the policy now before the Court and the one in the *Bergholm* case and arrive at any other conclusion. The two policies are identical. Both provide for waiver of premium upon receipt of proof of the total and permanent disability of the insured while the policy is in force and all premiums due prior to the time of making claim paid.

In the contract in the *Bergholm* case the language is:

> "Upon receipt by the Company of satisfactory proof that the insured is totally and permanently disabled * * * * * * the Company will:
>
> "1. Pay for the insured all premiums becoming due hereon after receipt of such proof and during the continuance of the total and permanent disability to the insured, and will also
>
> "2. Pay to the insured a monthly income for life * * * * * * the first payment of such income to be made immediately upon receipt of such proof * * * ."

The language in the contract here is:

> "If the insured * * * * * * shall furnish to the Company due proof that he is totally and permanently disabled * * * * * * the Company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues:
>
> "(a) The Company will pay a monthly income * * * * * * beginning upon receipt of due proof of such disability * * * * * *
>
> "(b) The Company will also, after receipt of such due proof waive payment of each premium as it thereafter becomes due during such disability."

The two contracts cannot be distinguished. Adopting the language of Mr. Justice Sutherland, who delivered the opinion in the *Bergholm* case, supra, " * * * * * * the obligation of the Company does not rest upon the existence of the disability; but it is the receipt by the Company of ***proof*** of the disability which is definitely made a ***condition precedent*** to an assumption by it of payment of the premium ***becoming due after the receipt of such proof.***"

The counsel for respondent point out on page 8 of their

brief, that the primary assumpsit of the Company expressed on the face of the policy say not a word about proofs of disability as a condition precedent to waiver of the premiums but mention only proof of death. This is true but the assumpsit with reference to waiver of premiums is immediately qualified by reference to section 3 of the policy, where the conditions are set out, and as the Court of Appeals below (R-86) said:

> "* * * * * * * no one turning to Section 3 could fail to understand that it limits the promise on the face of the policy in several respects."

In *Continental National Bank & Trust Co., etc., v. New York Life Insurance Co.,* (Illinois, not yet officially reported) the provisions of the policy are as follows:

> "New York Life Insurance Company agrees to pay to Isaac and Molly Spilky, parents of the insured, share and share alike, Beneficiaries, Two Thousand Dollars (the face of this policy) upon receipt of due proof of the death of Joseph L. Spilky, the insured;
>
> "And the Company agrees to pay to the insured one-tenth ($200.00) of the face of this policy per annum during the lifetime of the insured, if the insured becomes wholly and permanently disabled before age 60, *subject to all the terms and conditions contained in Section 1 hereof.*"

Section 1 referred to is the total and permanent disability benefits and provides:

> *"Whenever* the Company receives *due proof,* before default in the payment of premium, that the Insured, before the anniversary of the policy on which

the Insured's age at nearest birthday is 60 years and subsequent to the delivery thereof, has become wholly disabled by bodily injury or disease so that he is and will be, presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days, * * * * * * then

"(1) Waiver of Premium. Commencing with the anniversary of the policy *next succeeding* the receipt of such proof, the Company will on each anniversary waive payment of the premium for the ensuing insurance year * * * * * * ."

In the case last quoted the insured became insane and by reason of his insanity was unable to and did not notify the company of such disability. The action was to recover premiums paid and annual income from date of disability. It was contended by the plaintiff that the insanity of the insured excused furnishing of proof and that he was entitled to recover back the premiums paid.

In construing the policy, which is identical with the one at bar, especially in regard to the primary assumpsit on the face of the policy, the Court said:

"Under the provisions of Section 1 of the policy, as above set forth, we think it clear that *until* the Company received "due proof" of insured's disability, occasioned by bodily injury or disease, it was not required to waive the payment of any premium and was not liable to pay any disability benefits * * * * * . We regard the receipt by it of such proof as a condition precedent to its being required to waive payment of any premium, and to its liability to pay disability benefits."

Counsel for respondent rely upon *Minnesota Mut. Life*

Ins. Co. v. Marshall, 29 F. (2d) 977, as controlling in the case at bar. An examination of the policy in that case however will disclose that there the Court had before it an entirely different contract. In the *Marshall* case the obligation of the Company rested upon the existence of the disability. In the case at bar it is upon receipt of due proof. The *Marshall* case was clearly distinguished by *Bergholm v. Peoria Life Ins. Co.*, supra, when the Court said:

> "The pertinent provisions there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in the payment of premium, shall become totally and permanently disabled * * * * * and shall furnish satisfactory proof thereof, the Company will waive the payment of all premiums thereafter becoming due. The Court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished.
>
> "We do not need to controvert this construction of words quoted, or question the soundness of the view of the Court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. *Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of premiums becoming due after the receipt of such proof.*"

In the case at bar the condition is not "if the insured be-

comes disabled" as in the *Marshall* case, but is "if the Company receive due proof" of the disability, as in the *Bergholm* case.

The *Marshall* case has also been distinguished by *Orr v. Mutual Life Ins. Co.*, 64 F. (2d) 561, and *Western and Southern Life Ins. Co. v. Smith,* 41 Ohio App. 197, 180 N. E., 749, the policy in both cases being identical with the one now before this Court.

Assuming, however, that the *Marshall* case is controlling, and the present policy is ambiguous, the obligation of the Company to waive premiums would only relate back to the date of the disability, at which time the premium of November 16, 1931, was already due. The evidence discloses that the insured did not become disabled until about December 14, 1931, which was during the days of grace. In this policy and in the policy in the *Marshall* case the premiums to be waived were only those *thereafter* becoming due and not those already due. There is no provision in the policy at bar to waive payment of premium becoming due before disability ensues. In *Brams v. New York Life Ins. Co.,* 299 Pa. 11, 148 A. 855, quoted with approval by this Court in the *Bergholm* case, it was said:

> "Even if sufficient proof of total disability had been furnished within the grace period, it would have been insufficient because the failure to supply it prior to 'the default' defined in the policy as to the time when the premium was by its terms fixed as payable *notwithstanding the special benefit granted of leave to make payment within a month thereafter.* As said by the Court below all 'that the waiver obviously was intended to cover was in regard to premiums falling due after the occurrence of a state of total disability, not premiums which fell due while

the insured was still *in a state of good health.'* In the present case, there was no proof of a total disability as designated in the policy, either before the payment became due or during the month's grace thereafter." (Italics ours.)

See also *New England Mut. Life Ins. Co. v. Reynolds,* 217 Ala. 307, 116 So. 151.

Counsel for respondent on page 9 of their brief are also relying upon the supplemental benefits found on page 4 of the policy to attach liability on the Company. It is clear that the intention of the parties here was to give to the insured during his lifetime a right to reinstate his policy where he had become disabled prior to the due date of the premium in default without evidence of insurability. The right here imposes on the insured or someone for him the duty to furnish proof to the Company, during his lifetime, that he was totally and permanently disabled prior to November 16, 1931, the due date of the premium in default. This was not done, and even if it had, no liability would have attached since the insured was not disabled on said date. *The right was not intended to survive the insured.*

In *Brams v. New York Life Ins. Co.,* supra, a similar supplementary benefit as contained on page 4 of the policy was construed and held that the supplementary benefits did not aid the beneficiary.

The respondent on page 21 of their brief further contend that this case is controlled by Section 4228 of the Code of Virginia, providing that no action on a policy of life insurance shall be contested for any cause after it has been in force one year except for non-payment of premium. We must admit that we cannot follow the line of argument of respondent or see that it is logical reasoning.

The defense of the Company in this action is wholly on the ground of non-payment of the November 16, 1931, premium, and because of the non-payment the policy under Section 12 of the policy has lapsed and is now of no effect. The respondent in his pleadings (R-1) admits the premium was not paid but alleges that the policy did not lapse under the total disability provision of the policy which provided for waiver of premium upon receipt of proof. The Company is also defending upon the ground that the insured was not totally and permanently disabled on the due date of the premium in default. We cannot see that Section 4228, Code of Virginia pertains to this action in any particular.

Counsel for respondent on pages 6 and 25 of their brief further contend that Sections 4315 and 4317, Code of Virginia is likewise controlling. Section 4315 of the Code forbids the issuance of any policy of insurance against loss or damage from disease or by bodily injury by accident or both, unless it contains in substance the provisions set out on page 6 of their brief. Respondent omitted the most important part of said section, however, which provides that:

> "No policy of insurance * * * * * * shall be issued or delivered in this state *until a copy of the form thereof and the table of rates or manual of risks of the company has been filed at least thirty days with the Commissioner of Insurance* * * * * * * (Italics ours).

It is only violative of Section 4315 of the Code when the Company has failed to deliver a copy of the form or a schedule of rates with the Commissioner of Insurance. There is no evidence in the record that this has not been

done, or that the Company has failed to comply with this provision. It would appear that Counsel for the respondent are trying to confuse the Court on the real issues, else why should the material portion of said section be omitted.

To the same effect is Section 4317, Code of Virginia, cited on page 6 of their brief. Only a part of said section is quoted. Frankly we cannot see its purport as it has nothing to do with the issues here involved, and tends only to confuse the other issues.

The sole question involved in this action, contained on page 27 of respondent's brief, pertains to physical or mental capacity of the insured to furnish proof of his disability. Counsel have cited several cases to uphold their contention that such incapacity excuses the insured from furnishing proof of disability.

The cases cited are for the most part health and accident or fire insurance cases. The decisions in the life insurance cases cited are instances in which the respective courts have gone out of their way to find an ambiguity. For instance, the case of *Levan v. Metropolitan Life Ins. Co.*, 138 S. C., 253, 136 S. E., 304, relies upon *North American Accident Ins. Co. v. Watson*, 6 Ga. App. 193, 64 S. E. 693 (also relied upon by respondent) a health and accident case, holding the insured is excused from furnishing proof of the disability if incapacitated to do so, yet the rule in Georgia is just the reverse. See *Northwestern Mut. Life Ins. Co. v. Dean*, 43 Ga. App. 67, 157 S. E. 878, affirmed in 157 Ga. 321, 165 S. E. 235.

Rhyne v. Jefferson Standard Life Ins. Co., 196 N. C. 717, 147 S. E. 6, followed the Levan case as well as several health and accident cases, including *Roseberry v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785, likewise cited by respondent. *Swann v. Atlantic Life Ins.*

Co., 156 Va. 852, 159 S. E. 192, followed with approval both the *Levan* and *Rhyne* cases as well as *Minnesota Life Ins. Co. v. Marshall*, 29 F. (2d) 977.

In none of the foregoing cases is the contract logically construed. For instance, in the Swann case, supra, the court, without referring to the contract before it, collects the results of the various cases without reference to the language used in the policies in said cases, and concludes that "it would be unreasonable to say that he (the insured) should present proofs to the company if he were insane or unconscious." We contend that the courts in the three above-mentioned cases did not properly construe the language of the policies before them, but instead went out of the way to find an ambiguity, otherwise not existing.

In *Iannarelli v. Kansas City Life Ins. Co.* (W. Va. 1933) 171 S. E. 748, citing the *Swann* and *Rhyne* cases, it was said:

> "With the greatest deference to the learning and high authority of the courts which adopt the holding that the giving of notice or the furnishing of proof of disability is a condition subsequent, we are of the opinion that in reaching such a conclusion the contract between the insurer and the insured has sometimes been *relegated* to a position of secondary importance instead of being accorded to it the primary importance to which it is entitled. This line of cases discloses two characteristics: (1) 'Total disability' clauses are held to be ambiguous and a construction is adopted most favorable to the insured. Illustrative: *Minnesota Mutual Life Ins. Co. v. Marshall* (C.C.A.) 29 F. (2d) 977. (2) Cases arising from accident insurance contracts are relied on to sustain the proposition that the giving of notice of disability is a condition subsequent. *Rhyne v. Jefferson Standard Life Ins. Co.*, 196 N. C. 717, 147 S. E. 6; *Levan*

v. Metropolitan Life Ins. Co. 138 S. C. 253, 136 S. E. 304. *The reasons which support the 'condition subsequent' rule of the accident cases do not apply to the 'total disability' clause of a life insurance policy."* (Italics ours.)

In *New England Mut. Life Ins. Co. v. Reynolds,* 217 Ala. 307, 116 So. 151, 153, the court said:

"We think there is a manifest distinction between that class of cases and this. In such accident cases, the provision is in the *nature of a condition subsequent* wherein the insurer defends against a *liability already accrued.* In this case the beneficiary relies upon the waiver clause to keep the policy alive, to excuse the payment of premiums. *The disability set up in accident cases is usually the result of the injury insured against. Here there is no insurance against disability, physical or mental."*

See also *Perlman v. New York Life Ins. Co.,* (Pa. 1932) 161 A. 752.

Insurance Company v. Boykin, 12 Wall. 433, 20 L. Ed. 442, cited by respondent involves a fire insurance policy with reference to furnishing proof of loss, a condition subsequent, and has no relation to the question involved in the case at bar.

The case of *Pfeifer v. Missouri State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, is in line with the decision of the *Marshall* case, supra, and is to be distinguished from the policy now before the Court.

A splendid review of the authorities is to be found in *Smith v. Missouri State Life Ins. Co.,* 134 Kan. 426, 7 P. (2d) 65, in which the *Swann* case was cited. In holding that mental incapacity did not excuse the insured from furnishing proof under a policy similar to the one at bar, the court said:

"It is impossible to entirely reconcile the two lines of authorities. We think, however, that there is a distinction, in that in the one line of cases the courts have gone far afield to find an ambiguity in the contract, and *have overlooked the fact that the contract does not pretend to insure against disability, but merely makes disability, when coupled with proof or notice to the company, a settlement or waiver of the premium.* The contract is made for the benefit of the insured. On the one hand, the company obligates itself, in the event of total disability, to carry the insurance without charge to the insured, and on the other hand, the insured obligates himself, to furnish, while the policy is in force, proof of such disability. The contract is neither unreasonable or harsh." (Italics ours).

See also *Bloss v. Equitable Life Assur. Soc. of U. S.*, (Wash. 1934) 28 P. (2d) 303.

CONCLUSION

Our contention in this case is sufficiently stated in Iannarelli v. Kansas City Life Ins. Co., (W. Va. 1933) 171 S. E. 748, 750, where the court said:

"Proof of total disability must therefore be made while the policy is in force. The view that such proof may be furnished within a reasonable time after the policy has lapsed carries the idea of resuscitating a contract which under its very terms has become a *nudum pactum*. Such is not the purpose of the disability clause. There is nothing in that clause to excuse the furnishing of proof of disability while the contract is in effect. If the insured becomes insane or disabled so that he cannot himself furnish

proof of disability, that duty can be performed by some one for him, but if no one knows about the policy there is presented an unfortunate situation attributable to the lack of precaution or the non-communicativeness of the insured. *It is not a contingency insured against by the insurer.*" (Italics ours.)

This is in line with *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230; and *Egan v. New York Life Ins. Co.*, 67 F. (2d) 899, relied upon by petitioner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
A Corporation, *Petitioner,*

vs.

E. E. JOHNSON, Administrator of Benjamin F. Cooksey,
Deceased.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The cause presented here, shows a procedure by notice of motion in a state court to recover upon a policy of life insurance, which cause at the instance of defendant in the notice was removed to the United States District Court for the Western District of Virginia, where a jury was impaneled to try the issues raised. At the close of the evidence submitted by the plaintiff in the notice of motion, on motion of the defendant, the presiding judge directed a verdict for the defendant, and final judgment was entered upon the verdict from which the plaintiff appealed to the United

States Circuit Court of Appeals for the Fourth Circuit where the judgment of the District Court was reversed, and from which latter judgment a petition has been submitted to this Honorable Court for a writ of certiorari. (Opinion of Judge Soper, pp. 99 to 105, Record.)

I.

A STATEMENT OF FACTS.

On May 16, 1930, the Mutual Life Insurance Company (who for the sake of brevity will be hereinafter referred to as petitioner), issued to Benjamin F. Cooksey, (who for the like sake of brevity will be hereinafter referred to as Cooksey), its policy of insurance No. 4335235. Cooksey died on the 20th of January, 1932.

In consideration of the application and the first annual premium of $185.04, of which $31.99 was for the disability benefits thereunder, and the payment of a like amount upon each 16th day of May, petitioner agreed, 1st, *to pay* the Insured's beneficiary Forty-Five Hundred Dollars upon receipt of due proof of the *death,* and, 2nd, "If the Insured is totally and Presumably permanently disabled before age, 60, will *pay* him Forty-Five Dollars monthly during such disability, *besides* waiving *premium payments",* upon certain conditions set forth in an addendum of conditions attached to the policy. These assumpsits on the part of the Company are *all* that is contained on the *face* of the policy. The limiting conditions relied on by the defendant to release it from its express promises do not appear on the face, but are only referred to.

Section 3 of these "super-added conditions" printed on page 2 of the policy, "When Benefits become Effective", are as follows:

> "If, before attaining the age of sixty years and while no premium on this policy is in default, the Insured shall furnish to the Company due prooof that he is totally * * * disabled * * * the Company will

grant the following benefits during the remaining lifetime of the Insured so long as such disability continues";

and section (b) thereof provides:

"The Company will also, after receipt of such due proof, waive payment of each premium as it *thereafter* becomes due during such disability."

The conditions further provided:

"The amount payable in any settlement hereof shall not be decreased because of the *disability benefits granted.*"

See original policy, which is not copied in the record, but under stipulation 7, Record, p. 92, was certified as a part of the record.

By subsequent endorsement made June 8, 1931, the premiums were changed from annual to quarterly payments of $49.05 payable on the 16th days of May, August, November and February in each year. (See page 4 of the original policy.)

The policy contained further provisions that:

"A grace of thirty-one days shall be granted for the payment of each premium after the first, *during which days of grace the insurance shall continue in force.*"

and

"If this policy shall become payable by the death of the Insured, *any unpaid premium* or premiums necessary to complete premium payments *for the policy year* in which such death occurs, including *over-due premiums* if death occurs within the days of grace, shall be deducted from the amount payable."

By a supplementary rider attached to the policy, among other things, under the title, "Benefits if proof delayed and no premium in Default", it was provided:

"If, while no premium is in default, the proof furnished the Company * * * is such as to entitle the Insured with the disability benefits * * *, and if due proof is also furnished the company that such disability has been continuous since its beginning, the Company will:

"(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of such proof, instead of as of the date of receipt of such proof, and

"(b) Return any premium *due* after the *beginning of such disability* which has been paid during the continuance thereof";

and further, under the heading, "Benefits if *Premium in Default not over Six Months*", provided:

"If, not later than *six months after the due date of any* premium in default, and provided no *previously due* premium is also in default, due proof is received by the Company before the Insured shall have attained the age of sixty years, that the Insured was totally and permanently disabled * * * at the date when such premium in default fell due, and has been *continuously so disabled* since said *due date*, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefit shall be the same as if such default had not occurred."

The quarterly installments of premiums were paid as they matured up to and including the one payable on August 16, 1931, more than eighteen months after the date of the policy. The effect of this under the grace clause was to keep this insurance in full force and effect until December 17, 1931.

On a date, not definitely ascertained, but between November 15th and December 17, 1931, when the policy under the grace clause was in full force in all its provisions, Cooksey became totally and permanently disabled, both physically and mentally, not only from engaging in any gainful enter-

prise, but also from *preparing, executing and forwarding to the defendants proofs* of his said disability, and this disability continued until his death, which occurred on or about January 20, 1932.

During the interval between December 17th and his death, and during the lifetime of Cooksey, and within the six months' period, J. L. Brown, the agent for the petitioner and who had sold the policy sued on and collected the premiums and prepared extension notes, told one E. E. Johnson, an attorney at law and uncle of the deceased and who later qualified as administrator and is the plaintiff in the procedure referred to, "that if Cooksey was totally disabled before the thirty-one days expired the petitioner would pay the policy if anything happened," and thereby lulled those about Cooksey, who was at that time too ill to attend to such matters, into the justified belief that there was no necessity for paying the premiums or asking to have the policy reinstated, as he had a perfect right to do so under the six-month provision. The same agent told Mrs. Ethel Cooksey, the widow of the decedent (see her evidence p. 57 R.), "the day after Cooksey was carried to the hospital that he could fix it all right."

Petitioner was notified of the death of Cooksey under date of January 27, 1932 (see R. p. 33), and the claim was then made, not only under the policy at bar, but under another policy which was paid. The Company accepted liability under the latter policy and paid it, but finally, under date of February 16, 1932, declined liability under the policy in question, *only* because, as stated in their letter, "according to our office records this policy *lapsed* for the nonpayment of the premium due November 15, 1931," and after quoting at length the provisions of the said policy, under the heading, "Supplementary Benefits to Section Entitled 'Benefits in Event of Total and Permanent Disability before Age 60' ", containing the six months' provision, concluded:

"As this policy lapsed *prior* to the date Mr. Cooksey *became disabled,* there is nothing to be considered" (see R. p. 33).

We submit that the policy did not lapse on the date mentioned.

E. E. Johnson, who had qualified as administrator, and after refusal of petitioner to pay the policy, filed the notice of motion in the Circuit Court of Rappahannock County, Virginia, (see original Notice, R., pps. 1 to 5 inclusive). This notice of motion was then removed to the District Court for the Western District of Virginia upon the ground of diverse citizenship. Thereafter the notice was amended. (See R. pp. 10 to 17.) The motion sets out the grounds of recovery above stated. To this amended notice the petitioner filed a demurrer (see R. pp. 20 and 21) on April 20, 1933, which was overruled June 5, 1933 (see R. p. 22), and on the same day the petitioner filed its plea denying the contract in manner and form alleged, and set out seven separate grounds of defense, of which the second had ten subdivisions (R., p. 23), making 16 in all. Issue was joined on the pleadings and the evidence taken at Lynchburg commencing on June 16, 1933. At the termination of the plaintiff's evidence the defendant, on June 17th, and without undertaking to controvert any of the evidence introduced by the plaintiff, moved the court for a directed verdict for the defendant, which motion the court granted over the objection of the plaintiff, and directed the jury to find for the defendant, all of which was accordingly done; and upon this verdict a judgment in favor of the defendant was entered. To each of which acts and rulings the plaintiff excepted and moved the court to set aside the verdict as contrary to the law and the evidence (see R., p. 28), which motion was overruled and the plaintiff again excepted and final judgment was entered in favor of the defendant. From this judgment a writ of error was perfected to the Circuit Court of Appeals, which court reversed the District Court

and ordered the cause remanded to the District Court of the United States for the Western District of Virginia at Lynchburg with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Circuit Court of Appeals for the Fourth District. (See p. 106 R—Opinion pp. 99 to 105, R.)

II.

ASSIGNMENTS OF ERROR.

The assignments of error filed on August 28th are as follows:

(1) That the court erred in holding there was no issue of fact material for determination;

(2) That the court erred in directing a verdict in favor of the defendant; and

(3) That the court erred in refusing to sustain the motion to set aside the jury's verdict because contrary to the law and the evidence.

III.

QUESTIONS INVOLVED.

The questions involved and the manner in which they are raised are:

1st: When, if at all, did this insurance lapse? The plaintiff claims that the coverage in its entirety remained in full force and effect at least until December 17, 1931, the limits of the grace period.

2nd: Prior to any possible lapse the insured became totally and permanently disabled within the meaning of the policy sued on, whereby under the primary assumpsit of the policy the insured became entitled to all disability benefits, including the waiver of premiums, which prevented any lapse from thereafter occurring during such disability.

3rd: Under the express terms of the policy proofs of physical disability could have been made to the Company

at any time *within six months after default* provided no *previous* default had occurred, and this was done by the plaintiff after insured's disability.

4th: The refusal by the defendant on February 27th to consider the question of liability excused plaintiff from submitting further proofs.

5th: Within the grace period the insured became, not only physically but mentally incapable of filing any proofs, which excused him, during his lifetime, from so doing, if his disability continued so long.

6th: Under the provisions of the Virginia Code, Sec. 4228, the policy became uncontestable upon the grounds "relied on by the defendant", because the policy had been in force for more than one year prior to the death, and the contest of defendants is not "for the non-payment of premiums", nor for violation of conditions requiring the payment of additional premiums in event of naval or military service in time of war".

U. S. S. L. I. & T. Co. v. Massey, 159 Va. 832.

These questions all depend on the construction of the policy as applied to the evidence of the plaintiff, and arise under each of the assignments of error, 1, 2 and 3.

IV.

ARGUMENT.

Petitioner rests its case upon the rulings of the court in the case of Egan v. New Life Insurance Company, 67 Fed. (2d), 899; and upon the case of Bergholm v. Peoria Life Insurance Company, 284 U. S. 489.

The Egan case is not a well considered one, and in reading the opinion the Circuit Court of Appeals for the Fifth Circuit cites only one case in support of the conclusions reached, which is the Bergholm case.

The facts in the Egan case are not similar to the facts in

the Bergholm case, and the Bergholm case is not authority for the Egan case. In the last named case the policy provided:

> "If, after this policy shall have been in force one full year and before default in the payment of any premium the company receives due proof that the Insured before attaining the age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the company shall waive payment of such premium as it thereafter becomes due during the Insured's said disability."

And the court held, considering this clause, that while it was contended by the committee of the insured that he was insane and unable to personally furnish proof of his disability, that condition of the policy was inoperative and waived, the contention was untenable. Says Judge Foster in delivering the opinion:

> "The policy is plain and unambiguous. The contract clearly contemplates that, if for any reason the insured is unable to promptly make proof of his disability warranting the suspension of premiums and the payment of the annual installments, some one else in interest must do for him. This is a condition precedent necessary to be complied with to fix liability under the policy. It is very material to the risk that proof of total disability be furnished promptly and while the policy is kept in force by the payment of premiums. The provisions of the policy so requiring are not to be considered waived or rendered inoperative simply because of misfortune overtaking the insured. Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, 52 S. Ct. 230, 76 L. ed. 416"

The opinion is clearly at variance and in conflict with the law as laid down in the case of Minnesota Mutual Life Insurance Company v. Marshall, 29 Fed. (2d) 977, and is not

supported by the Bergholm case. The facts and conclusions of law, as we find in the Bergholm case are entirely different from those in the Egan case.

Counsel for petitioner here contend that the Bergholm case overruled the Marshall case, and that the Egan case is in accord with the Bergholm case. Neither of the cases, however, is similar to the present case. Permit us briefly to demonstrate not only that the Bergholm case does not overrule the Marshall case, but that it was decided on its pecular facts not here present or in the Marshall case. The facts in the Bergholm case are, the face of the policy contained no provision for disability benefits; after the first year the premiums were not payable quarterly; the policy by super-added provisions only had a one month grace provision and the conditional disability clause; the assumpsit provision was merely a promise to pay $500.00 upon due proof of death in accordance with a clause thereto attached, subject, however, to the provisions of the policy. On the face of the policy there is no reference whatever to disability benefits, except the following:

> "If at the end of twenty years from date this policy is still in force and no benefits shall have been paid or allowed under this policy on account of the total and permanent disability of the insured, the insured shall have the guaranteed option to continue this policy as a twenty-year endowment."

In an unsigned addendum added to the policy we find the following:

> "Income Disability Clause: A part of policy 140964.
> "*Upon receipt by the Company of satisfactory proof* that the Insured is totally and permanently disabled as hereinafter defined the Company will—
> "1. Pay for the Insured all premiums becoming due hereon *after the receipt of such proof* and during the continuance of the total and permanent disability * * *
> "To entitle the Insured to the above Total and Permanent disability Benefits *such policy at the time of*

making claim for such benefits must be in full force and all premiums becoming due prior to the time *of making claim must have been duly paid by the Insured.*"

Mr. Justice Sutherland, in delivering the opinion in the Bergholm case, says in part:

"There is evidence in the record from which it reasonably may be found that the insured was totally and permanently disabled from a time before the premiums first became in arrears, and that this condition continued until his death; but no proof thereof was furnished to the company.

The petitioners, nevertheless, contend that this is enough to bring into effect the promise of the company to pay the premiums which became due after the disability began. In support of this contention, Minnesota Mut. L. Ins. Co. v. Marshall, is cited. The pertinent provisions of the policy there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in payment of premiums, 'shall become totally and permanently disabled * * * and shall furnish satisfactory proof thereof, the Company will waive the payment of premiums thereafter becoming due,' and that 'upon the receipt of due proof of total and permanent disabilities * * * the Company will waive the payment of all premiums thereafter becoming due.' The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished."

Then Mr. Justice Sutherland further says:

"We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the ex-

> istence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof.* The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. Compare Brams v. New York L. Ins. Co., 299 Pa. 11, 14, 148 Atl. 855. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted." (Citing cases.)

In reading the opinion in the Bergholm case, it will be observed that the Marshall case is not overruled, but in effect affirmed.

The Egan case is not controlled by the Bergholm case; the facts and policy provisions being entirely too dissimilar; the Marshall case has never been overruled by any court in so far as we have been able to find; and it was admitted in the oral argument before the Circuit Court of Appeals in the present case that if the principles enunciated in the Marshall case were law petitioner had no defense; in fact Judge Soper asked one of counsel for petitioner when making the oral argument that if the Marshall case were sound law what would the position of counsel for petitioner be? And the response was, *petitioner would have no case if the Marshall case were sound law.*

There is no provision in the policy sued on here even in the super-added conditions, resembling these *express* ironclad conditions precedent, mentioned in the Bergholm case.

Bearing in mind the primary affirmative assumpsit in the main body of the policy, "If the Insured is totally and presumably permanently disabled * * * will pay to the Insured Forty-five Dollars monthly during such disability, besides *waiving premium payments*", this express undertaking cannot be nullified by adding inconsistent "weasel worded" provisions in a subsequent portion of the policy and thus make the first provisions a snare and a delusion

for the unwary insured, who are paying good money for the protection granted.

This Honorable Court held that the provision in the Marshall policy, "If the Insured, while the policy is in full force and before default in payment of premium shall become totally and permanently disabled, *and shall furnish* satisfactory proof thereof, the company will waive the benefit of premium thereafter becoming due", did not require such proof of disability as a condition precedent to a right to sue on the policy. Compare that with the language in the policy in the present case.

> "If the Insured is totally and presumably permanently disabled before age 60, will pay to the Insured Forty-five dollars monthly during such disability, besides waiving premium payments,"

even when coupled with the "weasel words" relied on now as limiting this express promise to pay:

> "If before attaining the age of 60 years, and while no premium on this policy is in *default,* the Insured shall furnish to the Company due proof that he is totally * * * disabled— * * * the Company will grant the following benefits during the remaining lifetime of the Insured."

And this case lines up with the Marshall case. So far as the import and effect on the minds of layman or lawyer is concerned, there is no difference between the Marshall case and the present case.

If the construction placed on these provisions is as contended for by petitioner, it is clearly violative of Sections 4315 and 4317 of the Virginia Code.

Section 4315 forbids the issuance of any policy of insurance

> "against loss or damage from disease or by bodily injury by accident or both * * * unless it contains in substance the following provisions * * *:

"(i) A provision that no such policy shall limit the time within which proofs of claims shall be furnished to the Company to a period *less than ninety days from* the date of death, dismemberment or loss of sight, or *from the termination of any other disability.*"

And Section 4317 provides:

"No company or agent shall issue or deliver in this state any policy which conflicts with any provision of the two preceding sections. A policy issued in violation of the same shall be held valid and shall *be construed as provided in said sections,* and when any provision in the policy is in conflict with any provision of the said section the rights, duties and obligations of the company and policy-holder and the beneficiary shall be governed by the provisions of the said sections."

These statutory provisions are mandatory, and we imagine will be followed by the Federal Courts.

Judge Parker in the case of Fountain & Herrington v. Mutual Life Ins. Co., 55 Fed. (2d) 120, says:

"The rule as to following the laws of the states is that we *are* bound by *state statutes* relating to rights of property within the State."

And Mr. Justice McKenna, in the case of N. Y. L. Ins. Co. v. Cravens, 178 U. S. 389, says:

"It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether if inclined."

And again on p. 398:

"A policy of mutual life insurance, it is contended, is an interstate contract, and the parties may choose its 'applicatory law'. Instances under the law of usury, * * * private international law, are cited as examples * * *. But if such cases apply at all they nec-

> essarily have limitations in the *policy* of the state. * * * But the interests of the state must be deemed to be expressed in *its laws.* The public policy of the state must be deemed to be authoritatively declared *by its courts.* Their *evidence we cannot oppose by speculations or views of our own.* Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced."

Counsel for petitioner in their petition (p. 3 thereof) contend that

> "The sole question presented in this case is whether insanity of the insured excused the failure to comply with an explicitly stipulated requirement of his life insurance policy to the effect that due proof of disability was a condition precedent to the waiver by the insurance company of the payment of premiums due on said policy."

When we assume that the contention is correct, it necessarily follows that the learned counsel concede the correctness of our views in regard to the other questions raised, and if the only question submitted here is whether, "*due proof of disability was a condition precedent to a waiver of premiums in the present case*"? we will confine what we have to say in regard to that single question.

Unquestionably the over-whelming majority of the state courts have passed upon this very question and laid down the rule that a condition precedent requiring notice of proof of disability is excused where the performance is impossible by reason of physical or mental incapacity of the insured, as where the insured is insane or unconscious during the period when proof should have been furnished.

Judge Soper in writing the opinion in the present case (p. 103, Record), says:

> "It must be conceded that the position of the defendant finds support in cases from two jurisdictions. New England Mutual Life Ins. Co. vs. Reynolds, 217

Ala. 151, 116 So. 151, 59 A. L. R. 1075. Whiteside vs. North American Acc. Ins. Co., 200 N. Y. 320. An overwhelming majority of the state courts that have passed upon the matter have, however, laid down the rule that a condition precedent requiring notice or proof of disability, is excused where its performance is impossible by reason of the physical or mental incapacity of the insured, as where the insured is insane or unconscious during the period when proof should have been furnished, and that the condition may be performed within a reasonable time after the incapacity is removed. Swann vs. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192. Rhyne vs. Jefferson Standard L. Ins. Co., 196 N. C. 717, 147 S. E. 6; Id., 199 N. C. 419, 154 S. E. 749; Levan vs. Metropolitan Life Ins. Co., 138 S. C. 252, 136 S. E. 304; Roseberry vs. American Benev. Assn., 142 Mo. App. 552, 121 S. W. 785. Continental Casualty Co. vs. Matthis, 150 Ky. 477, 150 S. W. 507; Comstock vs. Fraternal Acc. Assn. of America, 116 Wis. 382, 93 N. W. 22; Reed vs. Loyal Protective Assn., 154 Mich. 161, 117 N. W. 606; Woodmen's Acc. Assn. vs. Byers, 62 Neb. 673, 87 N. W. 546; and see 54 A. L. R. 611, note."

Then Judge Soper says (p. 104, R.)

"We think the rule announced by the majority of the state courts is the sound rule to apply. The situation is one where the parties may fairly be said to have contemplated a capacity to make the proof when disability should arise, for otherwise such a contract may prove a trap for the unwary by imposing conditions which incapacity may render it impossible to perform. There is, it is true, no language in the condition which qualifies it in the event that its performance should become impossible; but it is a general rule in the law of contracts, that impossibility may excuse a condition, though a condition precedent, if the existence or occurrence of the condition is no material part of the exchange for the promisor's performance, and the discharge of the promisor will operate as a forfeiture. Restatement of Contracts, Sec. 301; and see Illustrative Case (4). See also: Williston on Contracts, Vol. 2,

> Sec. 806. This principle, furthermore, has received recognition by the Supreme Court in *Insurance Companies vs. Boykin*, 12 Wall, 433, 436." * * *
>
> "The case should have been submitted to the jury with appropriate instructions, since the disease had made such progress by December 14, 1931, that the jury might have found that the insured was incapable on or before that date of complying with the provisions of the policy in regard to notice of disability."

One Virginia case to which we particularly direct the attention of the court is, that of *Atlantic Life Insurance Company v. Swann*, which twice went to the Supreme Court of Virginia, reported the first time in 156 Virginia, p. 852, the second time in 160 Virginia, p. 125. The question was raised on the first trial by a demurrer to a replication filed by plaintiff to defendant's plea, in which replication the plaintiff in effect said, that when the premium fell due in the grace period plaintiff was mentally and physically incapable of giving notice of his condition, by which replication the question was squarely presented. The trial court sustained the demurrer to the replication; the Supreme Court reversed the trial court, and on page 862 of the report said:

> "The insured could not present proofs before his disability, and he certainly could not present *proofs after he became mentally and physically incapable of doing so.* It would be unreasonable to say that he should present proofs to the company if he were insane or unconscious. Such a construction of the policy would render it of *no value* to the insured *in such a case*, although he may have been influenced thereby to purchase the insurance and has paid for the right to have the premiums waived."

On the second trial of the case, the trial court appears to have given an improper instruction using the words "reasonably incapable of notifying", and by reason of the use

of these words, or rather the word "reasonably", being a part of the instruction the case was again reversed.

And it is true the Supreme Court of Virginia did say when the case was before it the last time, as reported in 160 Virginia:

> "A careful examination of the evidence discloses that the plaintiff has failed to carry the burden of proof imposed upon her. On the other hand, from the evidence of numerous witnesses, we can draw only one conclusion, and that is that the insured was neither physically nor mentally incapacitated from performing his part of the contract of insurance in regard to furnishing proof, or giving the required notice." (160 Va. 130)

The first time the Swann case was tried the trial court was clearly wrong in sustaining the demurrer to the replication. The question ought to have been submitted to the jury to determine the fact whether the disability really existed.

In the second trial the trial court allowed the evidence to go the jury and the verdict was in favor of the plaintiff; but the evidence was insufficient to sustain the verdict.

Applying the principles in the Swann case to the present case, if the evidence is insufficient to establish the required proof of disability, then we have no case and all we asked the District Trial Court to do was to submit the question of disability to the jury, which request was declined. There was, we submit, evidence sufficient to entitle us to a jury hearing.

Judge Soper in delivering the opinion in the Circuit Court of Appeals (p. 105 R.) says:

> "The evidence of the plaintiff tended to show mental incapacity to furnish the proof, as well as total and permanent disability prior to December 17, 1931, when the period of grace permitted by the policy expired. Proof of disability might properly have been furnished at any time before the end of that period, in com-

pliance with the requirement that it be furnished 'while no premium on this policy is in default'. The defendant, contending that it might not be furnished after November 16, places some reliance on the provision of Section 12 of the policy that, 'all premiums are payable on or before their due date * * *'. But that language is immediately followed by the grace provision: 'A grace of 31 days shall be granted for the payment of each premium after the first, during which days of grace the insurance shall continue in force.' No premium could accurately be termed 'in default' in view of this provision, until the period had run; for, as pointed out in Minnesota Mutual Life Ins. Co. vs. Marshall, *supra*, p. 979, in answer to a similar contention: 'An obligation is due during the entire period during which it may be paid, whether that period extends over one day, three days, or thirty days. The premium was not really due, in the sense that the failure to pay it would result in a forfeiture of the policy, until the grace period had expired.'

The case should have been submitted to the jury with appropriate instructions, since the disease had made such progress by December 14, 1931, that the jury might have found that the insured was incapable on or before that date of complying with the provisions of the policy in regard to notice of disability."

V.

QUESTIONS INVOLVED AND AUTHORITIES IN SUPPORT OF OUR POSITION WITH REFERENCE TO THE QUESTIONS.

1. When, if at all, did this insurance lapse?

McMaster v. New York Life Insurance Co., 183 U. S. 25, 46 L. Ed. 64.

Osborn v. Rogers, 1 N. Y. Sup. 623, 624, 49 Hun. 245.

Pashley v. Third Methodist Church, 42 N. E. 13.

Arnot v. Union Salt Co., 79 N. E. 718.

Renner v. Bank of Columbia, 9 Wheat 581, 584.

2. Prior to any possible lapse in the policy, the insured became totally and permanently disabled, and entitled, under the primary assumpsit of the policy, to all the disability benefits, including the waiver of premium, which prevented any lapse from thereafter occurring during such disability.

McMaster v. New York Life Ins. Co., 183 U. S. 25.
Minnesota Mutual Life Ins. Co. v. Marshall, 29 Fed. (2d) 977.
Stratton v. New York Life Ins. Co., 155 Va. 259.
Harrison v. Provident Life Ins. Co., 141 Va. 659, 671.
Atlantic Life Ins. Co. v. Swann, 156 Va. 852.
New York Life Ins. Co. v. Curry, 115 Ky. 100, 61 L. R. A. 268, 103 Am. St. 297.
Knights of Columbus v. Burroughs, 107 Va. 688, 17 L. R. A. (N. S.) 246.
U. S. v. Bank of N. C., 6 Pet. 29, 8 L. Ed. 308.
Wiggins v. Knights of Pythias, 31 Fed. 122, 125.
Josephine Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 72 L. Ed. 395.
Peoria Life Ins. Co. v. Bergholm, 50 Fed. (2d) 67.

3. Under the express terms of the policy sued on, proof of prior physical disability could have been made at any time within six months after default, provided no prior default had occurred.

Minn. M. L. Ins. Co. v. Marshall, 29 Fed. (2d) 977.
McMaster v. N. Y. L. I. Co., 183 U. S. 25, 40, 46 L. Ed. 64.

4. The refusal by the defendant on February 27th to consider the question of liability excused plaintiff from submitting further proofs of disability, if any were otherwise requisite.

Royal Ins. Co. v. Martin, 192 U. S. 149, 162, 48 L. Ed. 385, 389.
Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. Ed. 866, 870.

National U. F. I. Co. v. Burkholder, 116 Va. 942, 948.
Continental Cas. Co. v. Lindsay, 11 Va. 389, 391.

5. Within the grace period the insured not only became totally disabled, but also physically and mentally incapable of filing proofs, which excused him during his lifetime from so doing.

Atlantic Life Ins. Co. v. Swann, 156 Va. 852.
Insurance Co. v. Boykin, 12 Wall. 433, 20 L. Ed. 433, 439.
R. & D. R. R. Co. v. Powers, 149 U. S. 43, 45, 37 L. Ed. 412, 413.
North River Ins. Co. v. Becnel, 33 Fed. (2nd) 231, 232.
Bass v. N. & W., 100 Va. 1, 8.
Bernstein v. Bord, 146 Va. 670.

6. Under the provisions of Virginia Code, Sec. 4228, the policy became incontestable upon any grounds except for the nonpayment of premiums.

Sec. 4228 Virginia Code.
U. S. S. L. I. and T. Co. v. Massey, 164 S. E. 529.
Whitfield v. Aetna Life Ins. Co., 205 U. S. 489, 501.
Metropolitan Life Ins. Co. v. Conway, 252 N. Y. 449, 169 N. E. 642.
Northwestern Mutual Life Ins. Co. v. Johnson, 254 U. S. 96, 65 L. Ed. 155.

CONCLUSION.

Considering the liberal construction put upon all policies of insurance containing similar provisions to the present, and considering the policies adopted by a great majority of courts in the states—both State and Federal Courts—we conclude that notice of disability is not required where the insured is unable physically or mentally to give it. No insurance company can waive the payment of a premium on account of disability of the insured until the company

knows of the *disability;* but when the company does know of the disability the premium waiver date will be *when the disability occurred.*

Illustrating, suppose a premium is due, say on the first day of a month—last day of the grace period—and the insured on his way to the office of the insurer to pay the premium suffers a stroke of paralysis and does not get to the office, and that by reason of the stroke he is from that very moment unable to speak or to move hand or foot, and died within ten days thereafter.

The company receives no notice of the disability until after the death of the insured. Should the company he allowed under such conditions to escape liability on either its unconditional promise to pay the insured in event of death, or its promise to waive the payment of premiums in event of disability? Unquestionably not.

In the present case the insured became disabled mentally and physically from giving the notice required by the policy while the policy was in force. The company did not receive notice of the disability until after the death of the insured because the insured was unable to give it. And why unable to give it? Because he was physically and mentally incapacitated.

Counsel for plaintiff in the District Court asked that the question be submitted to a jury to determine whether the insured was incapable on and before the last day of grace of complying with the provisions of the policy in regard to notice of disability, and whether the incapability in that regard continued until his death?

The request was denied by the District Court, and we respectfully pray that the relief asked by petitioner be denied, and that no writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit

Court of Appeals for the Fourth Circuit as prayed for in the petition.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 164

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

A. ROBINSON, ADMINISTRATOR OF BENJAMIN Y. COOLEY, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT.

I. JURISDICTION

Respondent does not question the jurisdiction of this court to review the judgment of the Circuit Court of Appeals.

He denies, however, that the cases of *Bergholm* vs. *Peoria Life Insurance Company*, 284 U. S. 489, 76 L. Ed. 416, or *Egan* vs. *New York Life Insurance Company*, 67 F. 2d, 899, justify a reversal of the judgment of the Circuit Court of Appeals.

II. STATEMENT OF THE CASE

The petitioner issued its policy of insurance to respondent's intestate on May 16, 1930. The premiums specified in said policy were payable quarterly in advance with a 31 day grace clause. The last premium paid was that of August 16, 1931, and kept the policy in full force and effect until November 16, 1931, and thirty-one days thereafter, December 17, 1931. See sec. 12 of policy.

In the face of the policy which is not copied nor printed

in the record, but under Stipulation 7 (R. p. 80) is certified as a part of the record, the Company agreed:

First, to pay the insured's beneficiary $4,500.00 *upon receipt of due proof of the death*, and,

Second, "If the insured is totally and presumably permanently disabled before age sixty, will pay him $45.00 monthly during such disability besides waiving premium payments, *all upon the conditions set forth in Section 3.*"

There was no Section 3 on the face of the policy itself. There was attached to the policy a printed form containing numerous superadded conditions. See pp. 2 and 3 of the policy.

Section 3 of these superadded conditions provided:

"If before attaining the age of sixty years and while no premium on this policy *is in default* the insured shall furnish to the company due proof that he is totally disabled, the company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues";

and Section (b) thereof provided:

"The company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

There was also attached to the policy a rider providing among other things under the title:

"Benefits if *proof delayed* and *no premium in default*":

"If, while *no* premium is in default, the proof furnished the company . . . is such as to entitle the insured to the disability benefits . . ., and if due proof is also furnished the company that such disability has been continuous since its beginning, the company will:

"(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of

such proof, instead of as of the date of receipt of such proof; and

"(b) Return any premium due after the beginning of such disability which has been paid during the continuance thereof."

And under the heading

"Benefits if Premium in Default not over Six Months":

"If, not later than six months after the due date of any premium in default, and provided no previously due premium is also in default, due proof *is received* by the Company before the insured shall have attained the age of sixty years, that the insured was totally and permanently disabled . . . *at the date when such premium* in *default fell due*, and has been continuously so disabled since said *due date*, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefit shall be the same as if such default had not occurred."

The insured became ill and totally disabled both physically and mentally, not only from engaging in any gainful enterprise, but also from preparing, executing and forwarding to the defendant any proofs of his disability before December 17, 1931, the day another premium fell due. This disability continued until his death, intestate, which occurred on or about January 20, 1932. The insured, if he had lived, would have had until June 17, 1932, to have filed proofs of disability and be entitled to the full protection of the policy without the payment of another cent, because no "*previously due premium*" was in default. This clause is wholly inconsistent with any theory that this policy became absolutely void on December 17th merely by reason of the *non-profer* of proof before that day, even if he were capable of furnishing them then.

In addition to this and in the interval between December 15th and his death, during the lifetime of Mr. Cooksey and within the six months period contemplated under the benefit

rider just mentioned, a certain Mr. Brown, the agent for the insurance company who had sold the policy, collected the premiums and prepared certain extension notes as to premiums previously maturing, told Mr. Johnson, the nephew of the deceased and who later qualified as administrator and is the respondent "that if Mr. Cooksey was totally disabled before the thirty-one days was out, that the company would pay the policy if anything happened" (see R. pp. 44-51), and a like statement was made to the insured's widow (R. p. 47).

The Company itself in substance made a like statement to the respondent in writing on February 16, 1933, after Mr. Cooksey's death (R. p. 30).

The Company was given formal notice of the death of Mr. Cooksey under date January 27, 1932 (see R. p. 26).

On February 16, 1932, the Company declined liability under the policy on the sole ground, as stated in their letter (R. p. 30) that "according to our office records this policy lapsed for the non-payment of the premium due November 15, 1931", and after quoting at length the above provisions of the policy under the heading "Supplementary Benefits to Section Entitled 'Benefits in Event of Total and Permanent Disability before age 60' "—the provision containing the six months default provision above recited, concluded:

> "As this policy lapsed *prior to the date Mr. Cooksey became disabled,* there is nothing to be considered." (R. p. 30).

It is now conceded that the policy did not lapse prior to that date. Yet the company denies liability but on other grounds. In consequence of this the plaintiff, who had in the meantime qualified as administrator of the decedent, filed his motion for judgment in the Circuit Court of Rappahannock County, Virginia, (R. pp. 1 to 4), which was later removed to the U. S. District Court for the Western District of Virginia on the ground of diverse citizenship.

Thereafter the notice of motion was amended in certain particulars; the Company demurred; the demurrer was over-

ruled, and the defendant Company filed its grounds of defense denying the existence of the contract as alleged and specified its grounds of defense (R. p. 18). Issue was joined on these pleadings and the case was tried at Lynchburg, Virginia, on June 16th and 17th, 1933, to a jury.

At the termination of the plaintiff's evidence the court, on motion of the defendant, directed a verdict for defendant. To this ruling of the court the plaintiff excepted, and moved the court to set aside the verdict as contrary to the law and the evidence, (R. p. 22), which motion was also overruled. The plaintiff again excepted and final judgment was entered in favor of the defendant. From this judgment a writ of error was perfected to the Circuit Court of Appeals, Fourth Circuit. The assignments of error there were as follows (R. p. 23):

> 1. That the court erred in holding there was no issue of fact material for determination;
> 2. That the court erred in directing a verdict in favor of the defendant; and
> 3. That the court erred in refusing to sustain the motion to set aside the verdict.

In the Circuit Court of Appeals it was urged under these assignments—

(a) That the coverage of the policy in its entirety was in full force and effect at least until December 17, 1931, and that there had been no breach of condition, under *McMaster* vs. *New York Life Insurance Company*, 183 U. S. 25, 46 L. Ed. 64;

(b) That if any breach of condition thereafter arose, it resulted not from the non-payment of premiums but from the failure to furnish proofs; and under the provisions of the Virginia statute Section 4228, the company could make no defense on any ground other than the non-payment of premiums, the policy having been in force more than one year. This Section, so far as applicable, reads as follows:

> "Sec. 4228. Suicide or death by legal execution; when policy incontestable; exception.—In any action, motion or other proceeding on a policy of life insurance

hereafter issued to any person residing in this State at the time of issuance thereof, or which is otherwise subject to the laws of this State, to recover for the death of such person, it shall be no defense that the insured committed suicide, . . . Nor shall such policy be contestable for any cause after it shall have been in force *during the lifetime of the insured* for one year from its date, except for non-payment of premiums. . . ."

(c) That the superadded conditions of the policy relied on to defeat the policy were void under the provisions of Sections 4315 and 4317 of the Virginia Code which, so far as applicable, read as follows:

> 4315. "No policy of insurance against loss or damage from disease . . . shall be issued or delivered in this state . . . unless the *exceptions be printed with the same prominence as the benefits to which such exceptions apply*; nor unless it contains in substance the following provisions: . . .
>
> > (i) A provision that no such policy shall limit the time within which proofs of claims shall be furnished to the company to a period less than ninety days from the *date of death* . . . or *from the termination of any other disability*".
>
> 4317. "No company or agent shall issue or deliver in this state any policy which conflicts with any provision of the two preceding sections. A policy issued in violation of the same shall be held valid and shall be construed as provided in the said sections, and when any provision in a policy is in conflict with any provision of the said sections, the rights, duties and obligations of the company and policy holder and the beneficiary shall be governed by the provisions of the said sections."

(d) That the policy did not require proof of disability as a condition precedent to a waiver of the premiums; and if it did, that the mental and physical inability of the insured to do so excused the furnishing of such proof, and that there was ample evidence in the record to submit these questions to the jury.

The Circuit Court of Appeals in its opinion (R. p. 83) overruled the proposition (a) of respondent and failed to pass on (b) or (c), and in respect to (d) held that such disability, if it existed, did excuse proofs; that there was ample evidence to justify submitting that question to the jury, and reversed the cause and remanded it for new trial. (See R. p. 90). To this judgment a writ of certiorari was issued by this court on petition of the Insurance Company.

III. CONTENTIONS OF THE RESPONDENT

It is our contention that the Circuit Court of Appeals ruled erroneously on all of these questions except the last.

IV. ARGUMENT

The petitioner in its brief, (p. 4) contends that

> "the sole question is whether the mental or physical incapacity of the insured excused the failure to furnish proofs of disability pending the death."

~~Petitioner~~ Respondent contends that under Section 240 of the Judicial Code as amended the case is here as under "unrestricted writ of error or appeal; and that under *Cole* vs. *Ralph*, 252 U. S. 286, 289-90, 64 L. Ed. 567, 574, and *Lutcher, etc. Co.* v. *Knight*, 217 U. S. 257, 267, 54 L. Ed. 757, 61; all of the questions presented to the Circuit Court of Appeals may properly be inquired into by this court and should be under the circumstances of this case.

In *Cole* vs. *Ralph*, 252 U. S. 286, at page 289-90, 64 L. Ed. 567, at page 574, in dealing with this question, this court said:

> "The defendant does not rely entirely upon the ground of decision advanced by the Circuit Court of Appeals, but urges at length that if it be not well taken the record discloses other grounds not considered by that court for reversing the judgment and ordering a new trial, and he further urges that if the decision of the Circuit Court of Appeals be right it is not sufficiently comprehensive to serve as a guide to the court or the parties upon another trial. . . . In the

circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period."

"The entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals by reason of the writ of error issued out of that court." *Lutcher and Moore Lumber Co.* vs. *Knight*, 217 U. S. 257, 267, 54 L. Ed. 757, 761. *Camp* vs. *Gress*, 250 U. S. 318, 63 L. Ed. 1004; *Meccan* vs. *Wannamaker*, 252 U. S. 242, 64 L. Ed. 827.

(a) Physical Disability Fixed Liability for Premium Waiver

Your petitioners therefore urge that in remanding this case for a new trial, the physical disability of the plaintiff to engage in a useful occupation prior to December 17, 1931, (the expiration date of the grace clause) as well as his mental and physical capacity to furnish proofs of loss at that time, should have been left open to inquiry by the jury because the occurrence of the disability and not the furnishing of proof fixed the liability of the insurer thereunder, and that the right of the petitioner to contest liability on any ground other than non-payment of premium should have been denied.

As already pointed out, the assumpsits of the company expressed *on the face of the policy* say not a word about proofs of disability as a condition precedent to payment of the policy or waiver of premiums, but mentions only *proof of death.* See face of policy where the assumpsit is, first, to pay the insured's beneficiary $4,500.00 upon *receipt of due proof of death*, and, second:

> "If the insured is totally and presumably permanently disabled before age 60, *will pay* him $45.00 monthly during such disability, *besides waiving premium payments*, all upon the conditions set forth in Section 3."

There is nothing said her at least about furnishing proofs as a condition *precedent* to liability under this policy. Proof

of death alone is mentioned, and the face of the policy shows that an additional premium was paid for the risks covered by the disability benefits.

It is true that Section 3 if it stood alone and was the *only assumpsit* in the policy, as was the case in the *Bergholm* case, supra, as well as the *Egan* case, could be construed to sustain the position of the petitioner and the conclusion of the Circuit Court of Appeals in respect thereto, but it *does not stand alone.* It is bound to be read in connection with the primary assumpsit of the policy and not to destroy it.

It must also be read in connection with the superadded provisions under the heading "Benefits if Premium in Default not over Six Months":

> "If, not later than *six months after the due date of any premium in default,* and provided no *previously* due premium is also in default, due proof is *received by the company* before the insured shall have attained the age of sixty years, that the insured *was* totally and permanently disabled at the date when such premium in default fell due, and has been continuously so disabled since said due date, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefit shall be the same as if such default had not occurred."

Every stipulation in this clause has been complied with: Due proof was given on January 27th within one month after the supposed default, that insured had been continuously disabled since the due date, and no *previously due payment was in default.* The opinion of the Circuit Court of Appeals dealing with these contentions said that the language referred to on the face of the policy is immediately qualified by reference to "the conditions set forth in Section 3"; and of the provision in reference to default after six months, says that "the right of reinstatement is *obviously* not intended to survive the death of the insured"; that "the requirement of proof of disability before default contained in the disability benefits Section 3, is designed to afford the company an opportunity for investigation "during the life time of the insured

and thus protect itself against fraudulent claims *after death* that the insured had become totally and permanently disabled before the default occurred", and continues:

> "The requirement is relaxed by the supplemental provision *if during the life of the insured* due proof is received by the company that the insured was disabled when premium in default fell due."

The trouble with this line of argument is that it relies on assumptions, arguments and the addition of words not found in the policy to sustain the conclusions, and goes counter to all rules of construction applicable to contracts of insurance such as this. The policy does not "obviously" contemplate the continued life of the insured before proofs, nothing is said about opportunity to investigate during the life of insured, nor require proofs during the life of the insured or *by him.* On the contrary it only stipulates for "receipt of due proof", source not specified "not later than six months after due date."

Granted that the provision of clause 3 quoted if alone, and there was no other clause in the policy of assumption on the part of the insured, the conclusion of the court in respect to its effect standing alone might be correct; but when read in conjunction with the clear assumption for value to pay disability benefits and waive premiums in event of disability prior to age sixty, and the additional clause just quoted of additional benefits in event of delayed proof, all that we can get out of it is such conflicting provisions in the same policy as to raise an ambiguity and necessitate construction.

It is to be borne in mind here that protection against this very disability was clearly within the coverage of the policy and that a separate consideration was demanded and paid therefor; that the event against which it insured and for which the deceased had paid full value actually occurred, and that the insured was given six full months more to make proof, and that the insurer is here seeking to escape liability for failure to comply with a condition to be performed *subsequent to the happening of the event insured against.*

Italics supplied throughout except where otherwise stated.

In dealing with a similar question in *McMaster* vs. *New York Life Insurance Co.*, 183 U. S. 25, 46 L. Ed. 64, this court said:

> "We are dealing purely with the question of *forfeiture*, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted if possible which will sustain rather than forfeit the contract."

And again, speaking of the contract there under consideration, which is identical in principle with the contract here, said:

> "As the contracts were *for life* and were not determinable . . . at a fixed date but *only by forfeiture*, it appears to us that the applicable rules of construction forbid the denial of the month of grace in whole or in part";

and then comments:

> "It is worthy of remark that it was specifically provided that after the policies had been in force one full year they should become incontestable on any other ground than *non-payment of premiums.*"

There is not only such a provision in this policy, but Section 4228 of the Virginia Code contains the mandatory provision to the same effect.

> "Nor shall such policy be contested for any cause after one year from the date except for nonpayment of premiums or the violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war."

It will be observed that this provision is not applicable to one feature of the policy only, but to the policy in its entirety.

Petitioner places great reliance on the *Bergholm* case, 284 U. S. 489, 76 L. Ed. 416. This is clearly distinguishable from the case at bar. We have taken the precaution to

examine the record of that case in this court with the following result: The face of the policy contained no provision for disability benefits or premium waiver at all. By superadded provisions only the one month grace provision and a conditional *disability clause* was added. The original assumpsit on the face of the policy was merely a promise to "pay $5,000.00 upon due proof of death . . . subject to the provisions of this policy." On the face of the policy there is no reference to disability whatsoever. In the unsigned addendum of Conditions the disability liability is changed from that on the face of the policy to read as follows:

> "Upon receipt by the Company of *satisfactory proof* that the insured is totally and permanently disabled as hereinafter defined, the company will—
>
> "1. Pay for the insured all premiums becoming due hereon after receipt of such proof and during the continuance of the total and permanent disability . . . to entitle the insured to the above total and permanent disability benefits such policy at the time of making claim for such benefits must be *in full force and all premiums becoming due prior to the time of making claim must have been duly paid by the insured.*"

It is thus clear that the conditions comprising the only assumptions in the policy in the *Bergholm* case are materially different from those here presented and free from the ambiguity here present. It was in regard to this that the Circuit Court of Appeals in the *Bergholm* case said "explicit language of that provision *negatives* the conclusion that the appellant consented that the fact of the insured becoming totally and permanently disabled as defined in that provision should have the effect of keeping the policy in force without the payment of the stipulated premiums." 50 Fed. 2d 67.

The langugage of the policy which was passed on in *Minnesota M. L. I. Co.* vs. *Marshall*, 29 Fed. (2) 977, certiorari refused 279 U. S. 85, 76 L. Ed. 416, is in import and legal effect substantially identical with the policy here in question. That policy was dated October 14th. Premiums were due on October 14th of each year. The second premium due October

14, 1926, was not paid during the grace period. The insured died November 29, 1926, fifteen days after the expiration of the grace period as the result of an appendix operation on November 16th, also beyond the grace period, but the evidence showed that he had suffered from this appendicitis for several days prior thereto and had been disabled, not mentally, but physically. The Circuit Court of Appeals at page 977, said:

> "Did the provisions of the policy require a waiver of the payment of the premium which became due October 14, 1925, simply because the insured became totally and permanently disabled during the grace period?"
>
> "The policy provided that if the insured while the policy is in full force and effect and without default in the payment of the premiums shall become totally and permanently disabled as hereinafter provided, *and shall furnish satisfactory proof thereof*, the company will waive the payment of premiums thereafter becoming due . . .; 2nd, *upon the receipt of due proof of total and permanent disability as above defined* the company will waive the benefits of all premiums *thereafter becoming due.*

Compare this provision with the provision in the face of the policy and it parallels it in all essential particulars, except that nothing is said here as to proof of disability as a condition of the disability benefits.

> "If the insured is totally and presumably permanently disabled before age sixty, will pay to the insured $45.00 monthly during such disability besides waiving premium payments, all upon the conditions set forth in Section 3."

The *Marshall* case, discussing the language first above quoted, said:

> "On the question of when the time of waiver of the payment of premiums begins under policy provisions similar to those quoted there are two lines of decision; one holding that proof of disability fixes the time when the waiver begins; and the other holding

that the time of waiver is the time of disability, and that a reasonable time thereafter is allowed to make proof of such disability, and that if death occurs before the proof of disability is made, although after the due date of the premium, the insurance company is liable, where the disability arises before the due date of the premium, and continues until death."

That court then held it was unnecessary to distinguish the language of the policies upon which these opinions are based, stating that they unquestionably put a different construction upon practically the same provisions of insurance policies, and adds:

"These decisions of *themselves establish doubt* as to the construction and meaning of the provisions which we are called upon to interpret. It is a familiar rule of construction that where contracts of insurance are prepared by the insurer and there is *doubt* as to the meaning of their provisions, it will be construed most favorably to the insured.

" 'It is said that compliance with this provision, *even though impossible*, was a condition *precedent* to the securing of insurance. But narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer, and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted'. *Stipcich* vs. *Metropolitan L. I. Co.*, 277 U. S. 311, 72 L. Ed. 395.

"Forfeitures are not favored: 'The rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than *forfeit* the contract.' *McMaster* vs. *New York Life Insurance Co.*, 183 U. S. 25, 46 L. Ed. 64.

"However much the legal mind may differ as to the meaning of these provisions, the ordinary layman would construe them to mean that, in the event he became disabled before his premium fell due, his insurance would be continued until his disability was removed or *until his death*. That is the natural and reasonable construction to be placed upon the language used in this policy. Any other construction, to my mind, *would be contrary to the full purpose of*

the contract and deprive the insured of one of the principal benefits of his policy. The right of the insured to have his premiums discontinued during disability is one that he had paid for. To make its operation depend upon the *time of proof* of disability, and not *upon the time of disability itself*, which was the *real thing* that *he was protecting himself against, renders the provision of the policy under construction inoperative and the right of no value.*

"If the insured had died during the grace period of his policy, without the payment of the premium which fell due October 14th, no question would be raised as to the right of his beneficiary to recover. Why should a different rule be applied *when a disability during the grace period is sustained which renders him totally and permanently disabled?* To give the insured the full benefit of his policy, and carry out the intention which was doubtless in the minds of the contracting parties when the policy was written, his policy should not be allowed to forfeit where his disability occurs during the grace period of his policy and *continues until his death.* . . . Why so construe t his disability clause in insurance policies as to make it *worthless* in many cases? Death benefits are good for thirteen months, and are as of the *date* of death. Why should not the disability benefits be good for the same length of time, and begin as of the date of the disability? This is not an unreasonable and strained construction, and would be more in keeping, perhaps, with the representations made at the time of writing the insurance policy. The same measure of protection should be extended to the insured during the thirteenth month that he admittedly has during the other twelve months."

It will be observed that the only assumpsit in the *Marshall* case was:

"If the insured . . . before sixty and *while the policy is in full force* and effect, *without default* in the *payment of premiums* shall become totally and permanently disabled *and shall furnish satisfactory proofs* thereof, the company will waive the payment of the premiums thereafter becoming due, subject to the following conditions and provisions."

The foregoing conditions in the *Marshall* case are just as explicit as the conditions in Section 3 of the superadded conditions in the case at bar, as follows:

> "If before . . . sixty while the policy is in full force and effect, without default . . . shall furnish satisfactory proof thereof, the company will waive the payment of the premiums thereafter becoming due . . . subject to the following conditions and provisions".

Among other conditions in the *Marshall* policy are these benefits:

> "*Upon receipt of due proof* . . . the Company *will* waive the payment of all premiums *thereafter becoming due under the policy.*"

The judgment in the *Marshall* case was in favor of the insured and application for certiorari was refused by this court. 279 U. S. 851, 73 L. Ed. 994. Notwithstanding this fact, however, this decision in the *Marshall* case was the subject of comment and implied approval by this court in the subsequent case of *Bergholm* vs. *Insurance Company*, supra. It found no inconsistency between its conclusions in the *Bergholm* case and those of the Circuit Court of Appeals in the *Marshall* case, and so stated. In commenting thereon, Mr. Justice Sutherland in delivering the opinion of the court, said:

> "We granted certiorari because of a *supposed* conflict with *Minnesota Mutual Life Insurance Co.* vs. *Marshall*, 29 Fed. 2nd, 977";

And said of the policy in the *Bergholm* case:

> "In case of total and permanent disability there was a provision for payment of the monthly income for life . . . the policy expressly providing if any premium is not paid on the date when due, this policy shall cease and determine except as hereinafter provided. The income disability clause which follows this language provides 'Upon receipt by the company of . . . proof that the insured is . . . disabled as hereinafter defined, the company will:

> " '1. Pay . . . all premiums becoming due hereon after the receipt of such proof and during the continuance of the . . . disability.
>
> " '2. Pay the monthly income . . .
>
> " '3. . . . To entitle the insured to the above total and permanent disability benefits this policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to the time of making claim must have been duly paid.' "

It is needless to point out that no such express language as this is used in the case at bar, and there is no other language in the *Bergholm* policy in any way in conflict therewith. The court then refers to the petitioner's contention that the right to the disability benefits accrued at the time of the disability and thus distinguished the two:

> "In support of this contention, *Minnesota Mutual Life Insurance Co.* vs. *Marshall*, supra is cited. The pertinent provisions of the policy there, however, *differ from those found in the policy here under consideration.* There the policy provided that if the insured while the policy is in force and before default in payment of premiums, shall become totally and permanently disabled *and shall furnish satisfactory proof thereof*, the Company will waive the payment of premiums *thereafter becoming due*, and that upon the receipt of due proof of total and permanent disabilities, the Company will waive the payment of all premiums thereafter becoming due". The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished.

It thus appears that the *Marshall* case had the same promise to waive *in futuro* and conditioned on furnishing satisfactory proof as is found here in the *added condition* only. The petitioners contend that the *Bergholm* case overruled or qualified the *Marshall* case. It did nothing of the kind. On the contrary Mr. Justice Sutherland, speaking for this Court, continued:

> *"We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver: but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy."*

And recognizing the principle which we are here applying, said:

> "It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. This canon of construction is both reasonable and just."

And again said:

> "That policy (the Marshall policy) did not *expressly* require any proof to be submitted *before default* . . . and while policy was in full force and effect. The Bergholm policy did. In the *Minnesota Life Insurance* case the fact of the existence of disability before default and not proof thereof was *the test of liability.* In the Bergholm case the test of liability is not existence of the disability, but also the making of proof thereof."

Not only is this the construction placed upon the similar policy in the *Marshall* case by the Circuit Court of Appeals and approved by this court in the *Bergholm* case, but it is the identical construction placed upon this policy itself by the company *after the death of the insured* and *after proof of disability had been submitted.* See R. p. 30, where in a letter addressed to the respondent by Thomas P. Morgan, Jr.,

Manager of the petitioner Company, he says, referring to the policy here in suit:

> "We quote herewith letter from the Home Office:
>
> "According to Home Office records, this policy lapsed for the non-payment of the premium due November 16, 1931.
>
> "We refer you to that part of the policy contract formerly held by Mr. Cooksey:
>
> " 'Supplementary Benefits to Section entitled Benefits in event of total and permanent disability before age 60'.
>
> "Benefits if premium in default not over six months—If not later than six months after the due date of any premium in default and provided no previously due premium is also in default, due proof is received by the company before the insured shall have attained the age of sixty years that the insured was totally and permanently disabled, as defined in the section entitled 'Benefits in event of total and permanent disability before age 60', at the date when such premium in default fell due, and has been continuously so disabled since said due date the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred'.
>
> "As this policy *lapsed prior* to the date Mr. Cooksey *became disabled*, there is nothing to be considered."

The position then taken by this company as to the proper construction of this very policy is exactly the construction placed upon it by the respondent. Petitioners now concede that this policy was *not* in default prior to the day Mr. Cooksey became disabled. The construction then placed upon this policy by the company is wholly different from that now sought and is evidently the result of an after-thought.

The Circuit Court of Appeals in dealing with this policy lays stress upon its provisions in the present case:

> "If while no premium on this policy is in default the insured shall furnish to the company due proof

> that he is totally and permanently disabled" the company will "after receipt of such due proof waive payment of each premium as it thereafter becomes due during such disability,"

losing sight of the like provision in the *Marshall* case:

> "If the insured . . . before sixty and while the policy is in full force and effect without default in the payment of premiums shall become totally and permanently disabled, and *shall furnish satisfactory proof thereof*, the company will waive the payment of premiums *thereafter becoming due subject to the following conditions and provisions*,"

among others of which are the following benefits:

> "*Upon receipt of due proof* the company will waive payment of all premiums thereafter becoming due under the policy."

The Circuit Court of Appeals in attempting to distinguish this case from the *Marshall* case, says (R. p. 85).

> "The Circuit Court of Appeals for the Eighth Circuit which decided the *Marshall* case has itself distinguished the form of expression there employed to one very similar to that employed in the present case. See *Orr.* vs. *Mutual Life Insurance Co. of New York*, 64 F. 2d, 561."

It is difficult to see just how the learned justice who delivered the opinion of the court fell into this error. The policy in the *Orr* case is wholly different in language and purpose from that used in the *Marshall* case or in the present case. It was on a form in use more than ten years prior to the issuance of the policy here involved. The dispute was solely to *recover premiums* which had fallen due and which had been paid between April 27, 1925, and September 22, 1931, and distinguished the *Marshall* case from the case there at bar in the same particulars that we now distinguish it. We quote only such of the italicized portions with such of the unitalicized context as is necessary to show the connection and the material error of the court in this particular:

> "*When* such benefits take effect. *If the insured shall* before attaining . . . sixty . . . provided all past due premiums shall have been duly paid, *furnish due proof* to the Company at its home office . . ., *the company upon receipt and approval of such proof will grant the following benefits*:
>
> ". . . The company will . . . waive payment of each premium as it becomes due *commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the company must be paid in accordance with the terms of the policy.*" (Italics by the Court).

The Court commented: "There is no possible ambiguity in this language," and referring to the *Marshall* case, said:

> "The wording of the policy there involved is not the same as here and is far from being so clearly expressed. There this court deemed an ambiguity to exist and *properly* resolved the construction in favor of the insured."

It further appears from the report in the *Orr* case, page 563, et seq., that subsequent to the issuance of that policy new forms of policy "greatly liberalizing" their provisions were issued. We thus see that the policies as then issued accomplished clearly the purpose now asserted to be the intent of the policy at bar later adopted. If there was no purpose then to liberalize, why was the explicit language already used in the *Orr* case changed to the *ambiguous* and *contradictory* terms used in the policy at bar by the same company?

EFFECT OF THE VIRGINIA STATUTORY PROVISIONS

(b) Petitioner cannot defend for breach of condition.

Even if the construction urged by respondent is not the proper construction of the language used independent of statutory provisions, the construction is mandatory under the provisions of Section 4228 of the Virginia Code:

> "In any action . . . on a policy of life insurance hereafter issued . . . to recover for the

> death of such person, it shall be no defense that the insured committed suicide . . .. Nor shall such policy be contestable for any cause after it shall have been in force during the life time of the insured one year from its date, except for non-payment of premiums and except for violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war . . ."

It cannot be contended that this is not an action on a policy of life insurance, nor that the ground of contest is the non-payment of premiums. It is submitted with equal confidence that both the death and disability benefits were within the coverage of this policy.

This section of the Virginia Code was construed by the Court of Appeals of Virginia in *U. S. S. L. I. & T. Co.* vs. *Massie*, first reported in 164 S. E. 529, and later on rehearing in 159 Va. 832, where both opinions are reported. In that case the insured applied for insurance stating the he was a lawyer, and among other things stipulated:

> "I hereby warrant and agree . . . if . . . I . . . at any time shall . . . personally engage . . . in service on any railway train . . . any agreement under this application shall thereupon become null and void." (159 Va. 827).

The policy was issued thereunder. The insured was killed on the 29th day of March, 1929, while acting as a conductor for a railroad company. There was a judgment for the insured in the lower court. On appeal the Virginia court first reversed the lower court upon the ground that breach of this condition forfeited the policy. After reargument on January 12, 1933, with all eight members of the court present, the court reversed its first decision in a very clear discussion of the questions by Justice Holt, and the judgment of the lower court was unanimously affirmed. The court said, 159 Va. 850:

> "It is perfectly plain that an insurance company is not liable for a loss not covered by its policy. To use an extreme illustration, if one were to die after the

expiration of a term policy there would be no liability, and a company which undertook to defeat an attempt to saddle upon it a loss would not be contesting it. To use another illustration, if it were to declare that death due to an accident in an airplane was not covered, there could be no liability for such a loss, and a denial of liability would not constitute a contest, but it is also plain that if liability were denied because of some *condition subsequent broken*, that would be a contest within the purview of Code Section 4228 as amended by Acts 1926 (c) 205," citing *Whitfield* vs. *Aetna Life Insurance Co.*, 205 U. S. 489, 501.

In discussing the application in that case, the Court said:

"It provides that if the insured shall personally engage 'in service on any railway train . . . any agreement under this application shall become null and void' ".

And on page 851, says:

"This rider was proposed to New York Life Insurance policies: 'death as the result of service, travel or flight . . . except as a fare paying passenger, is a risk not assumed under this policy . . . .'

"It will be observed that it deals with 'a risk not assumed'. Cardozo, C. J. in *Metropolitan Life Insurance Co.* vs. *Conway*, Superintendent of Insurance, 252 N. Y. 449, 169 N. E. 642, held this to be a valid rider provision, and said: 'The provisions (statutory) that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years *is not a mandate as to coverage*, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or *thereafter became invalid by reason of a condition broken*' ".

The Virginia Court continued:

"Judge Cardozo, in commenting upon *Northwestern Mutual Life Insurance Co.* vs. *Johnson*, 254 U. S. 96, 65 L. Ed. 155, made this observation:

> " 'The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be void.' "

This is the exact condition here. The disability benefit and premium waiver provision was within the coverage of the policy and the result here, if the construction contended for by petitioner is correct, is a provision for a forfeiture of a policy for breach of a condition subsequent to the attaching of the liability by the occurrence of the event insured against. The Virginia court said:

> "Continuing, Cardozo, C. J. said: '. . . With such a clause the death of the insured, coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk'.

And continued, at page 852:

> "This sound distinction appears in many cases. Had the policy declared that 'death from suicide is a risk not assumed', a different conclusion would doubtless have been reached."

The court reversed its former decision and affirmed the original judgment. It cannot be denied that the risk of total disability occurring within the life of the policy was within the coverage of the insurance and that the effect here is to forfeit that coverage by reason of a subsequent forfeiting condition other than the non-payment of premiums.

It cannot be doubted that these provisions of the Virginia statute and the policy of Virginia in respect to these matters as manifested by its statutes and by the decisions of its courts, is controlling on the federal courts in passing upon insurance policies issued within the state. See *New York Life Insurance Co.* vs. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116, 1122-23, where Mr. Justice McKenna said:

> "It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether if inclined."

And again on page 1123 L. Ed., he said:

> "A policy in mutual life insurance, it is contended, is an interstate contract and the parties may choose its applicatory law. Instances under the law of usury . . . private international law are cited as examples. . . . But if such cases apply at all they necessarily have limitation in the policy of the state . . . . But the interests of the state must be deemed to be expressed in its laws. *The public policy of the state must be deemed to be authoritatively declared by its courts.* Their evidence we cannot oppose by speculations or views of our own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced."

The court there applied the Missouri law to a contract made within Missouri though the policy itself declared it was to be governed by the New York law. The same principles are recognized and applied to insurance policies in *Equitable Life Assurance Society* vs. *Clements*, 140 U. S. 226, 35 L. Ed. 497, 500; *Mutual Life Insurance Co.* vs. *Illinois*, 193 U. S. 554; 48 L. Ed. 792; and *N. W. M. L. I. Co.* vs. *McCue* (a Virginia case), 223 U. S. 247, 56 L. Ed. 423, 424.

(c) Sections 4315, 4315 (i) and 4317 of the Virginia Code Annotated deny petitioner the right to rely on this defense,

1st, because a mere inspection of the policy shows that the exceptions relied on in Section 3 of Conditions to defeat the benefits offered under the face of the policy are not printed with the same prominence as the benefits to which they apply, but that these weasel words are printed in smaller type, and

2nd, because sub-section (i) of Section 4315 prohibits absolutely any provision that limits the term within which *proofs of claim* shall be furnished to the company to a period "less than 90 days from the date of death . . . *or from the termination of any other disability,*" and Section 4317 requires the policy to be construed as provided in said Section 4315.

The Virginia Supreme Court of Appeals has not had occasion to construe this particular section but has sustained similar provisions in respect to the minimum size that any restrictive provisions similar in purpose to this may be printed, saying in *Sulphur Mines Co.* vs. *Phoenix Insurance Co.*, 94 Va. 355, 359:

> "The object of the statute is a wise and beneficent one to protect applicants for insurance who are often times inexperienced and unacquainted with the provisions and stipulations usual in policies of insurance, by requiring that such conditions and restrictive provisions shall not constitute a defense unless they are *printed in the policy in type of a prescribed size.*"

And again:

> "If printed in small type these restrictive provisions might easily escape the observation of the unwary, and it has been therefore wisely ordered that they, and not the *policy*, shall be nugatory unless printed in type of such a size as would challenge the attention and be easily read by the ordinary man."

Nat'l L. I. Ass'n vs. *Berkley*, 96 Va. 543, *Eq. L. Ass'n* vs. *Wilson*, 110 Va. 571.

This statute carries this wise policy a step further and for the same reason that where a benefit is conferred by one clause of a policy, a restrictive clause shall be "printed with the same prominence as the benefits." That was not done with respect to the weasel worded provision here under consideration.

(d) Physical and Mental Incapacity to Furnish Proofs of Loss Excuses Failure to Furnish Them

The Circuit Court of Appeals was unquestionably correct in its conclusion that mental and physical inability to furnish proofs of disability excused the same and that there was ample evidence before the court to justify submitting that point to the jury.

There is some conflict of authority on this point, but as pointed out in the opinion of the Circuit Court of Appeals (R. p. 87) an overwhelming majority of the state courts that have passed upon this matter at all have laid down the rule that a condition requiring notice of proof of disability is excused by reason of the physical or mental incapacity of the insured, and this has been the ruling by the Supreme Court of Appeals of Virginia in *Swann* vs. *Atlantic Life Insurance Co.*, 156 Va. 852, 159 S. E. 192. Cases to the same effect in other jurisdictions are *Rhyne* vs. *Jefferson Standard Life Insurance Co.*, 196 N. C. 717, 147 S. E. 6, and 199 N. C. 419, 154 S. E. 749; *Levan* vs. *Metropolitan Life Insurance Co.*, 138 S. C. 253, 136 S. E. 304; *Roseberry* vs. *American Benev. Ass'n*, 142 Mo. Ap. 552, 121 S. W. 785; *Continental Casulaty Co.* vs. *Mathis*, 150 Ky. 447, 15 S. W. 507; *Comstock* vs. *Fraternal Assoc.*, 116 Wis. 382, 93 N. W. 22; *Reed* vs. *Loyal Protective Assoc.*, 154 Mich. 161, 117 N. W. 600; *Woodmen's Ass'n* vs. *Byars*, 62 Nebr. 673, 87 N. W. 646; *Pfeifer* vs. *Missouri S. L. I. Co.*, 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; *North American Accident I. Co.* vs. *Watson*, 6 Ga. App. 193, 64 S. E. 693. And such was the holding of this court in *Insurance Company* vs. *Boykin*, 12 Wall. 433, 439, 20 L. Ed. 442, 444. The facts in that case are thus stated by the Court:

> "The insured having applied to the agent of the insurers to make out proof of the loss, an affidavit was made by him, in which, after giving the particulars of the loss, he proceeded further to state that he believed the building had been set on fire by an incendiary; that he had heard of repeated threats of a person, whom he named, that he would burn

> the premises and that it was in consequence of these threats that he had procured the insurance which he was then seeking to recover. When this affidavit was laid before the insurance companies, they refused to pay . . . Testimony was given to show that at the time Boykin made this affidavit he was insane, and also that it was procured from him by fraud.
>
> ". . . The defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery. The last of these propositions is not denied".

And then the court concluded:

> "But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature and amount of the loss. Second, *if he was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy*".

In a note to *New England Mutual Insurance Co.* vs. *Reynolds*, reported in 59 A. L. R. 1075, it is stated:

> "The overwhelming weight of authority is to the effect that the insured in policies requiring notice of the accident or disability within a stated time after occurrence thereof is excused for his failure to give such notice . . . if he is prevented from so doing by reason of mental incapacity resulting from accident or disability provided such notice is given a reasonable time after recovery."

We find, therefore, that the decision of the Circuit Court of Appeals on this point is in conformity with the ruling of this court in *Insurance Company* vs. *Boykin*, supra; in conformity with the Virginia statute on that subject Sections 4315 and 4317; in conformity with the decision

of the Court of Appeals in *Swann* case, 156 Va. 852, and with the overwhelming weight of authority against which is cited the decision of the Circuit Court of Appeals, Fifth Circuit, in the *Egan* case, 67 Fed. 2d, 899, which is based wholly upon the *Bergholm* case. So far as the report of the *Egan* case shows, the only provision in the policy involving the disability and premium waiver benefits, are as follows:

> "If after this policy shall have been in force one full year and before default in the payment of any premium, the *company receives due proof* that the insured before attaining the age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the company shall waive payment of such premium as it thereafter becomes due during the insured's said disability".

In passing on the contention that since Egan was insane and personally unable to furnish proof he was excused therefrom, the Circuit Court of Appeals said:

> "This contention is untenable. The policy is plain and unambiguous. The contract plainly contemplates that, if for any reason the insured is unable to promptly make proof of his disability warranting the suspension of premiums and the payment of the annual instalments, someone else in interest must do so for him. This is a condition *precedent* necessary to be complied with to fix liability under the policy".

It is remarkable that though this language is thus construed in the *Egan* case to enable anyone to make the proof for an insane man, that in the case at bar and in dealing with the question of who might make the proof under the rider provision allowing such proof to be made six months after default, Judge Soper, held (R. p. 86) that the right thereunder to make proof within six months after default independent of mental incapacity "is *obviously* not intended to survive the death of the insured". In other words, in

the *Egan* case it was held because the policy did not specify who should make the proof that any person in interest could make it, whereas in this case, dealing with the primary right, Judge Soper held that because there was no specification as to who should make it that no one would be able to make it after the death of the insured, unless incapacitated from making it before and throughout the period of default.

The only condition *precedent* in this case was that stated in the face of the policy:

> "If the insured becomes . . . disabled . . . will pay $45.00 per month . . . besides waive premiums".

That condition, the one insured against, having occurred, the interest of the insured vested and was subject only to be defeated by breach of a *condition subsequent thereto.* In 12 C. J. 410, a condition subsequent is thus defined:

> "A condition which operates upon an estate already created and vested and renders it liable to be defeated or forfeited; one that, when it does or does not happen, is or is not performed, as the case may be, defeats the estate; a condition by the failure or non-performance of which an estate already vested may be defeated; a condition where an estate *or interest* is so given as to vest immediately, subject only to be divested by *some subsequent act or event;* one by which an interest already vested may be divested, or a *contingent interest defeated* before vested. In contract one which follows the performance of the contract and operates to defeat and annul it upon the subsequent failure of either party to comply with the conditions".

A condition subsequent is one to be performed or fulfilled after the vesting of the estate and the intent of which is to defeat it. 2 Minor 266. And it is well settled that conditions subsequent are not favored in law because they tend to destroy estates. *Potomac Power Co.* vs. *Burchell,* 109 Va. 676, 683.

> "Nothing is better settled than that in conditions subsequent, since they are in defeasance of interests

> already vested, courts of law and courts of equity are strict in requiring the very event or the act to be done, with all its particulars, which is to defeat the interest previously vested . . . As was said by Lord Alvanly, 5 Vesey Rep. 209, where there were clear words of gift, creating a vested interest, the court will never permit the absolute gift to be defeated, unless it be *perfectly clear* that the very case has happened in which it is declared that the interest shall not arise." *Lewis* vs. *Henry*, 28 Gratt. 192, 203. See also *New York Indians* vs. *U. S.*, 170 U. S. 1, 15, 42 L. Ed. 932, et seq.

The general rule on this subject is stated in 13 C. J. 642:

> "Where from the nature of the contract it is evident that the parties contracted on the basis of the *continued existence* of the person or thing, condition or state of things to which it relates, the *subsequent perishing of the person or thing or cessation of existence of the condition will excuse the performance*, a condition to such effect being implied, in spite of the fact that the *promise may have been unqualified.* The rule extends to a contract based on the assumed existence and continuance of a condition, or on the continuance of a subject-matter, which is not the direct object of the contract. It is necessary, however, that the existence of the person or thing or condition be the basis and foundation of the contract. Otherwise the death or destruction of the person or thing or the failure of the condition to continue will not discharge the parties. Or as the rule has been stated in different language: Where there is principal subjectmatter in the power of one of the parties and an accessory or subordinate benefit arising by contract out of its existence, the court will not in the absence of express words imply a term that the subjectmatter shall be kept in existence merely to provide the subordinate or accessory benefit to the other party." 13 C. J. 642, supported by a wealth of authority.

There was no beneficiary named in the policy who could make proof, the beneficiary being the insured, or his estate. Therefore, there was no one who could make proof during the life of the insured and the continuance of his incapacity, which

likewise incapacitated him from appointing an agent to make it for him.

Hence, even if the condition for proofs contemplated the continued existence or capacity of the insured and the furnishing of proofs during such existence and capacity, his death waived such proof "a condition to such effect being implied in spite of the fact that the promise may have been unqualified."

V. CONCLUSION

It is respectfully submitted that the judgment of the lower court remanding this case for a new trial should be affirmed but with instructions that the entire case should be submitted to the jury on both points as to whether or not the insured was under physical disability prior to default in the payment of premium, as well as on the point of his physical and mental incapacity to furnish proofs of such disability.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES.

No. 154.—October Term, 1934.

The Mutual Life Insurance Company of New York, Petitioner, *vs.* F. E. Johnson, Administrator of Benjamin F. Cooksey, deceased, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 3, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

On May 16, 1930, the petitioner, the Mutual Life Insurance Company of New York, issued in Virginia to Benjamin F. Cooksey, who resided in that state, a policy of life insurance in the amount of $4,500 with disability benefits. Upon the face of the policy, it is provided that if the insured is totally and permanently disabled before the age of sixty, the company will pay him "forty-five dollars monthly during such disability . . ., besides waiving premium payments, all upon conditions set forth in section 3." The conditions thus incorporated by reference are these: "If before attaining the age of sixty years, and while no premium on the policy is in default, the insured shall furnish to the company due proof that he is totally and permanently disabled . . ., the company will grant the following benefits during the remaining lifetime of the insured as long as such disability continues. Benefits (a) . . . The company will pay a monthly income to the insured of the amount stated on the first page hereof . . . beginning upon receipt of due proof of such disability . . . . (b) Waiver of Premium. The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability." There is also a provision that the policy will be reinstated within six months after a default if proof is given within that time that at the date of the default the insured was totally disabled and has continuously remained so.

A quarterly premium became payable under this policy upon November 16, 1931, subject, however, to a period of grace of thirty-one days, whereby the time for payment was extended until December 17. This premium was never paid by the insured, though all earlier premiums had been paid as they matured. On December 17, the date of the default, the insured, who was under sixty, was confined to his bed, a sufferer from chronic nephritis, which on January 20, 1932, resulted in his death. There is evidence by concession that as early as December 14, 1931, he was totally and permanently disabled, not only physically but mentally, to such an extent that he was unable to give notice to the insurer in advance of the default, and thus procure the waiver called for by the policy. The company takes the ground that because of the omission of that notice the default is unexcused and the policy has lapsed.

In this action by the administrator the District Court upheld the company's position, and directed a verdict for the defendant. The Court of Appeals for the Fourth Circuit reversed, and remanded the cause for trial. 70 F. (2d) 41. For the defendant it was argued that insanity is no more an excuse for the failure to give a notice that will cause the payment of the premiums to be waived than for the failure to make payment of the premiums when waiver is not a duty, either conditional or absolute. Cf. *Klein* v. *New York Life Insurance Co.*, 104 U. S. 88. For the plaintiff it was argued that waiver having been promised, though subject to a condition as to notice, there must be a liberal construction of a requirement that is merely modal or procedural, and the insurer will not be deemed, in respect of matters of that order, to have exacted the impossible. The controversy is one as to which the courts of the country are arrayed in opposing camps. Supporting the petitioner's view are *New England Mutual Life Insurance Co.* v. *Reynolds*, 217 Ala. 307; *Iannarelli* v. *Kansas City Life Insurance Co.*, 171 S. E. (W. Va.) 748; *Smith* v. *Missouri State Life Insurance* Co., 134 Kan. 426; *Berry* v. *Lamar Life Insurance Co.*, 165 Miss. 405, 142 So. 445; *W. & S. Life Insurance Co.* v. *Smith*, 41 Ohio App. 197; *Reynolds* v. *Travelers' Insurance Co.*, 28 Pac. (2d) (Wash.) 310; *Dean* v. *Northwestern Mutual Life Insurance Co.*, 175 Ga. 321; *Hall* v. *Acacia Mutual Life Association*, 164 Tenn. 93, 46 S. W. (2d) 56; *Egan* v. *New York Life Insurance Co.*, 67 F. (2d) 899. Cf. *Courson* v. *New York Life Insurance Co.*, 295

Pa. 518; *Whiteside* v. *North American Accident Insurance Co.*, 200 N. Y. 320. *Bergholm* v. *Peoria Life Insurance Co.*, 284 U. S. 489, is not apposite, there being no evidence in that case of incapacity, physical or mental, to give the prescribed notice. Supporting the respondent's view are *Swann* v. *Atlantic Life Insurance Co.*, 156 Va. 852; *Rhyne* v. *Jefferson Standard Life Insurance Co.*, 196 N. C. 717; 199 N. C. 418; *Levan* v. *Metropolitan Life Insurance Co.*, 138 S. C. 253; *Pfeiffer* v. *Missouri State Life Insurance Co.*, 174 Ark. 783; *Reed* v. *Loyal Protective Association*, 154 Mich. 161; *Marti* v. *Midwest Life Insurance Co.*, 108 Neb. 845; *Roseberry* v. *American Benevolent Association*, 142 Mo. App. 552; *Metropolitan Life Insurance Co.* v. *Carroll*, 209 Ky. 522; *Comstock* v. *Fraternal Accident Association of America*, 116 Wis. 382; *Missouri State Life Insurance Co.* v. *Le Fevre*, 10 S. W. (2d) (Texas) 267. Cf. *Trippe* v. *Provident Fund Society*, 140 N. Y. 23; *Insurance Companies* v. *Boykin*, 12 Wall. 433, 436; Restatement of the Law of Contracts, American Law Institute, § 301 (4). The case is here on certiorari.

We think the contract is to be interpreted in accordance with the law of Virginia where delivery was made. *Northwestern Mutual Life Insurance Co.* v. *McCue*, 223 U. S. 234; *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Scudder* v. *Union National Bank*, 91 U. S. 406, 412, 413. As to the meaning and obligation of such a policy, the highest court of the state has spoken in *Swann* v. *Atlantic Life Insurance Co., supra*, construing a provision substantially the same as the one in controversy here. The ruling there was that notice was excused by physical and mental incapacity to give it. "When the disability of the insured occurred while the policy was in force, he was entitled to have his premiums waived until his death, for his disability continued until his death. He had paid for this right, and to say that he should lose the benefit of his policy because he failed, through mental and physical incapacity, to present proofs would be harsh and unreasonable under the circumstances."

In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a considera-

tion of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law merchant is present in this case. *Swift* v. *Tyson,* 16 Pet. 1. No question is here as to any general principle of the law of contracts of insurance (*Carpenter* v. *The Providence Washington Insurance Co.,* 16 Pet. 495, 511; *Aetna Life Insurance Co.* v. *Moore,* 231 U. S. 543, 559), with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so "balanced with doubt," we accept as our guide the law declared by the state where the contract had its being. *Trainor Co.* v. *Aetna Casualty Co.,* 290 U. S. 47, 54, 55; *Sim* v. *Edenborn,* 242 U. S. 131, 135; *Community Building Co.* v. *Maryland Casualty Co.,* 8 F. (2d) 678, 680; *Fordson Coal Co.* v. *Kentucky River Coal Corp.,* 69 F. (2d) 131, 132.

The judgment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.